CASALE / HERCULES - Attorney Notes

see Tom Seward

Casale WMD Larry Hawthorne — Sent to Bahamas

Gloria Millsap - go see Jesus Camacho
5/25/79 hired

5/5/97 ~10:00 am

in office of Diane Peters, part time ken
when ~~she~~ showed
told Larry, Daniel Hernandez (foreman) w/him
↳ told go get ~~Lee~~ Pettit &
tell him to ~~update~~ sand &
paint logo b/c TNRCC is here

created job for Diane Peters

Releasing unlawful

~~DP~~, Merkl Henne
~~Diane + Robt~~

Robt Eyman - BASF he tried to bring prob to Atkin b/c Tim told em - Adkins -
Randy Moore
Diane Peters wife
Robt Peters BASF - logistic co-or
Larry calls & says did you tell em, & Robt says "yes" b/f Hennel
Bobby Adkins Env person for BASF
c not my p.
Roger Pettit Here took Bel

Bubba Moore

Hennch takes Peters as logistic co-or over boss
covering ass
Seward also Bahamas -

Rig #7 - Tinat

Tinat says Dow stopped b/c learned Jackson
Stopp. dumping waste water in
canal at night

N. Deland hot
cyclohexane cold & less expensive to clean

1994 $ no disposal water
↳ but BASF billed for
waste water disposal

Ron Beasley - DA

AG Rouch Offshore
Lloyd Sternberg Morris
Buddy Stevens Bollinger

Strip & Bloody - only thing -
records
Larry B. has "shaded" records

Harrah sending lots of bus
Doc Adams retired -

RL Taylor - Dow 1990 asks Tinat
how Harc disposing of waste water,
says dumping in river ICWW
& Taylor says no, we won't do
business that way, so he tells
Jimmy Jackson to stop dumping -

Mark ~~B~~ Hersch
in Bahamas

Ltr from ~~Behm~~ Seward to Gloria
cleaning re command

Stansbury - Unc
Bellinger - ~~23~~ felonies govt records
11 counts violations
emissions
failure to [illegible]

T.C. Randy

BASF

~~Was invoice paid~~
~~Was work wrong?~~
~~Lamb - [illegible] -~~
~~DP 3328 Lost profits if trial~~
~~553~~
~~Barr 4~~
~~Kerr 3 - 55,1828 - 4~~
~~Doyle 4 55 R / 4565~~
~~Bhow 7 16~~
~~Smith (1) 4545~~
~~Van Arsdale 2 3335~~
~~Egg 5~~

Stelle Roache

Snapper Lane since '81

uncle cellar bldg got on - don't need to
know my name
threatened me - quit calling
the state - "we're watching you"
- I know you're in bedroom -

Bellinger at home w/ paper & coming after
lawsuit & another guy there in car

Jim Sweeney
Rippenstein

2 cats died of cancer w/ grit
settled in their water
↳ tears - how found out -

they're suing me -
you mean you or husb
is there any difference?

run from garage to door -
at night -

Other threats about calling state
to Pierson + Bob

Crossbows an ventilation

don't know about rights till wake up in a
day [illegible]
have to paint more on 1 side of garage -

now working 7 hours b/c J
sand blasting —

had chemist out after Jimmy Phillips JC

won't work in yard b/c won't
run risk of bringing more ill
than she already is!

Cosgh

TK Lay Hethorn 12/07

BASF admits

Here pd for trip for BASF reps

Here pushing this sling out door

Tom Seward had written her a letter telling her to be quick

Many people at work in Jan

Mud in canal itself - core sample

[28-29]

two 0'T
on mafte 1/1

Nothing from Doc Inspector

Nursing Summaries

faxed Here to 1-713-789-4063 5/14/98
Larry Priddy & Chief ~~TBDC~~ TACB
Here cited twice in 89

Piring accompanies Condo Lindy.

Brazosport Facts
12/5/90

ops in wind

8/25/95
Bellinger & never cited

- Never called their clients -

1981 TO Freeport for fishing
Stayed at yacht club

8/81 Buy from Charles Casley, quiet about po

1st notice in fall, wind change in fall low

yellow dust
Odors periodically

complained about Fish

Rob Cook

MSDS Sheet
Or ~~Bags~~ materials
names of Degas
prior compo-
how big boiler
how hot water
how capture
residues, what
residue going in
venting & vapor
schedule for tanks

selling off, using
other parties
when going -

What do w/
rust & BS&W

10 or 15K to
get rid of it

toxic vapors above
emission limits

3d party liability of
customer

Caustic acids soda
vinyl

cargo left in bottoms
property of barge owner

residue problem of
barge owner

Tx so operators can't
clean and
oil barges

usually bid jobs

89

Bob & Stelle Cole — Hercules Offshore Oper -

City water - 10 years — Grandchildren while parents worked

all Br Harbor on same well system -

Ned Cobb -

Been here

Black girl from St

Sierra Club

Anonymous call - Mickey Tyrant (ex-employee, current competitor - c Herc

We called LASER - — won't spend money to comply w/ regs

Airboard -

EPA -

vs. Community Drills -

On Superfund

last few yrs symp

Dr La Roche - neurotoxins -

Mor here before had complained

Neighbor here 3-4 yrs, w/probs.

Mtg in 5/2/83

Most chicken operate

10/82 violations

men sick 3 days after Thanksgiving after left here

Tom Seward currently operates per Tyrack

videos w/ them all chased up

Complaining to Fisch & then Herc who came in '89

Bob & Estelle move in 1981, Fisch Engr w/ facility for 1st 8 yrs, some probs w/ F and currently w/ Hercules

water well ~~w~~ w/ all 'Br Herbat to 86-7, then city water -

B.H. Well was next to ~~Herc~~ Herc, still there,

Br Harbor inc'd -

Bayer Uhdt -

Compl to ~~Haze~~ Fitch since moved in

Here is designated Superfund site

Shrimper Denny - man in between Coach & Here

Wind direction - correlation to cleaning dates

Benzene air flooded -

Lots of video -

Coach got coming in 93 / before they ward sing in beginning in '91

predominant - ~~[illegible]~~

- Fried diet - pictures

Stella - high BP, stomach probs -

No asbestos in house -

Nick list of chemicals -

Brother Bennett + (Evelyn Roberts)

└ she's losing muscle mass

Nick Abraham - Texas Lake Sierra Club -

Dr Urick -

- Grandchildren - Ficklin -

Estelle's daughter Saprina Dugan

Bill: Micky Sinert

Micky Sinert is witness. Bob Casale was not able to set up meeting + gave me his work #. I spoke w/ Cathy Sinert (Micky's wife) + gave her our # + told them to call collect. She was not willing to set up meeting.

Bob Casale said you could meet w/ neighbors this evening, but would like to coordinate it w/ Sinert meeting

Cosch

Ned Carson

Bottoms w/ vinyl chloride & other
nasty concerns

list of chemicals removed w/o
adequate controls

small boys playing ops fall
through crack

speech by AG & compl issue

Richard Flannery - old TX Air Control Bd

Ned Toxicologist -

Ned Vapor recovery

TX Clean Air Act -
Enforcement cases

OVR 1000 compl in 12 yrs
one enforcement, reduced to no action

qz records } yrs, days/week
— } hours of operation

are maintain of facility
equipt to control pollution

Permit -

What kinds of paint used-? | air pollution control devices

maint is critical

permit not adequate
combination lousy permit + poor maint
purchasing of sand blasting
material

nature of chemicals

records show who bays come from

PVC paints w/ residual vinylchloride
Benzene

coast guard inspections
sediment next to facility

can do some modelling

Nothing else nearly to have impact
he did the [illegible] out business

Jim Tarr modeling P.E.
Stone [illegible] Environmental
310-546-2553

Vo stack -
at ground level

- What chems are
- some amt of material in holes, in several hundred gallons

Sand blasting + organic vapors

does paint on barges have lead in it, in lead dust on Bob's ~~pro~~ property
pot'l for lead in soil, in what kind of paint on barge

Ask TNRCC in Hou to check for lead

Do they use lead based paint

Cascade

Jim & Dorothy

here 7 yrs

couple of yrs
stop
had blasting ~ 1 yr ago b/f Thanksgiving
called police
called police couple of mo's ago -
~~[illegible]~~ c neighbor
talking to mgr - shut down
called 6 times

~~[illegible]~~ failed to call him to prove re wind -
they stopped when I call in -
talked to Larry Bolinger

ag OK

Marla did neighborhood probs
Jackie such many times w/4 kids

Most homes are 2d homes

can't see when done

have seen dumping out of barge -
bilge water

noise a problem Nov to today - over

Dorothy here mostly

Jim Piccini 2 407 7247

1 loge 3 to 4 weeks

Late at night - noise inside -

~~Hum~~

Odors have been annoying for them

When blasting on ramp - bad -
watching stuff float out which - ie
dust storm settling on water

Jim & Bob got in Boat & watched
blasting out over water

winds blow people, wetlands on water

protest a compilation of Machkevich
Marilyn " friend of
Bob's on

Ray more vocal complainer
Jim has spoken
Jim had water from city ~~since~~ in 89 when moved in

~~2 yrs~~ lost avocado trees

Jim has noticed odors at Bob's, not Jim's
~ 1 1/2 yr ago went over & asked, then upwind

~~Hum~~

Nov
55 - lost pol upt, blasting away

Dow has gator W/sinix, notching

Jim Jules Dow a prof goal neighbor

~ 3 yrs ago calls finds dyed blk
hunting & had to cover up to
get inside

Ronald had seen yellow mark
smell today & no boys

Setting it out periodically, in today after
holding

Bomb scare - never told neighbors
city says confirmed - 48 hrs -

Hrs seen protection suits

Mike Momsen
HL&P 512- 972 8465

notices sticks on water
blast when feel they can get away with it
middle of day
seen em blast at night
w/ temporary lighting -
had a fine dust, sweet smell
in air

lives full time for 10 yrs 88 -
dogs on city water

looked ~~bought~~ for 1 yr b/4 bought

mtg w/ CAER 93 or 94
particularly aggravating - couches
catching fumes & blasting
city (fire dept 1st) - no help
CAER came & more concerned
Doc Adams
Shortly thereafter ~~B~~ laid k for
a while

didn't keep diary bk didn't
know -

certain ~ 3 yrs
complaints -

... w/ Gra - Dan

noise & fumes are complaint – don't like
pollutants

James Bowman
seems ok the

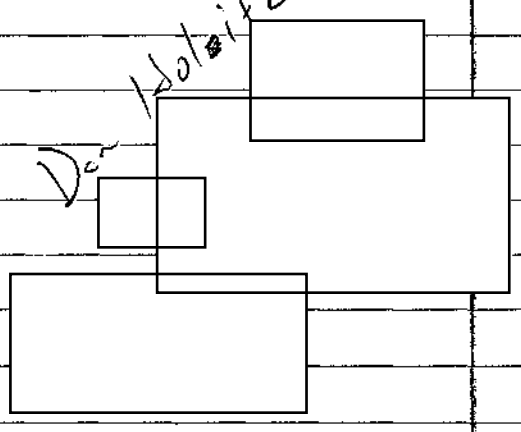
4 1/2 yrs '91-

Oxychem

Reinjct ~ beg 2 years
gauge twice now -

Wants to see them gone

Sinnsec not bad in Deer Park,
Worse last 2 1/2 yrs which here



Ray Repczynski

~~They~~ c̄ coverage, failure to test

been 4½ yrs
no testing of grounds

July '95 - wkend fish tournament
air blowing out - pop off valve?
able to smell odor

Have man c̄ it's a small circ...
but in wrong place
10-12 guys on wkend
c̄ doing ~~do~~ nothing
& tried to find out what
exposed to & never did

they have tapes of council
mtg w/ stmts by Vera

due N is Brazoria Cy Sanchez

tanks were wood pumped
incidentaryl - noses

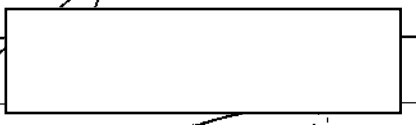
failing malaise, sore in joints, rashes
worked w/ wood all life
...
going to doctor

Wife breathing & headache,
dizziness -

~~1~~ 82 sig -
~~...~~ ... & ...
of ...
...

Casale

Jim & Dorothy Pirrung — 1st 2 yrs bad
7 years here



Complaints made — 6 times
10 times

one or 2 yr. period - no blasting.

w/ city & Freeport

soil testing more known.

Larry Ballinger - mgr of Hercules.

one instance of dumping.

blasting stuff in FCWW
debris floating in H_2O all the time.

{Marilyn Muklewitch = owns near boat business next door.

{Water well switched over before 1989.

Has complained to police re: noise
November 1995

Two Dow alerts — siren — phone calls 2 — 1 hazard
1 all clear

☆ Hendrix had been seen last week
was notified anyone
2/18 in sign

Mike Monsen
(w) 512-972-8465

James Bowman

noisy - sand in pool ;

CASALE DEPOSITION NOTES

[Casale/Deposition]

Tom Horde Deposition

HMSC →

Thomas Edward Horde

John McDowell:

given deposition before

[redacted]

Koba - Wife

[redacted]

putting together a new company

Oil and Supply Company →

Rig Tech

Dolphin Daulton Systems: Supply - nursing home supply company - operated out of Pensacola, TX

Rig Tech - drilling rigs, offshore / supply boats →

Hercules Offshore Corporation

V/P of Operations

1982 - Drilling Superintendent -

did off-shore drilling for major oil co's

had to offshore rigs -

never had job title w/ HMSC.

Horde reported directly to Tom Seward

he was the only V.P.

8:10 mgmt ecs reported to him

CFO reported directly to Seward

Robert Miller

Parker took over 12/30/98 of HOSC

Parker purchased assets of

the Malaysians conducted the negotiation

100%

Trinigy - owned by individuals in Malaysia

HMSC →

HOSC -

Seward would occasionally ask Horde to go down

never had ownership interest in HMSC

no ownership interest in HMSC

never paid by HMSC

2. Was your compensation by HOSC tied to the performance of HMSC?

hired Marine Services to do your work

sometimes it would go

7. To your knowledge, did rules exist pertaining to cleaning badges?

Not sure who advised HSMC -

would give advice on capital expenditures

HMSC - in charge of operations

Lanny Ballinger was in charge.

Ballinger was indicted

prior to Daryl -

Mickey Tiner -

M/T has barge cleaning facility in Brazoria Cty

Ballinger 2-3 yrs

Daryl: 1 yr

Mickey: -

Sept-93 - Malaysians bought HMSC in Sept-93

Working for Offshore drilling co.

Prior to Sept. 93 -

moved into facility in 89-90

Seward's affiliation w/ HMSC

Accounting was kept updated

all bills paid thru HOSC

- Offshore paid Maniacs bills

to Hordes knowledge they

Never seperate accounts.

Formula that Seward had set up.

~~wo~~ does not know if there were Seperate payroll Accounts →

Robert Millsap → [redacted]

disputes between Cassles been going one since facility opened

Offi

89-91 there Horde was there on a daily basis.

did not cost HOSC business

Larry Bullinger
Daryl
Mickey Tiner
Tom Seward
→ these individuals told ~~You~~ Horde that Cassles had cost HMSC business.

Seward told him Cassle was calling customers and complaining
- mainly Dow Chemical
ever since Cassle had moved into that subdivision.
complaining about noises and smells when there was nothing go on

never though noise was excessive
barge never vented into atmosphere

Ballinger - "Casale would call"

HMSC " "

↓

Who participated in the misidentification of substances

Ballinger -

Suing Cooks:

- committee meeting
- Mellis
- Hovde
- any knowledge of debris blasted from barges -
- to get away from silica

had rail they brought out of the water.

never saw liquid substances discharged into canal -

spoke w/ Seward @ 6:30 this morning

speak to him once a week.

lives in N.Y.

investbanker

Harbor Capital

recv'd severance package when he left Off-shore

met w/ Bruce Stuntall 3 yrs ago.

spoke w/ Stanfield yesterday

not aware of any claims that workers were exposed to toxics substances.

did not participate in disposal of waste water.

did not participate in reporting of paperwork to state.

no work in Marine Services bankruptcy

deposition on rig accidents

6/9/58 mtg w/ Ron Beverly Gloria Millsap Cascle

Robert " " Jimmy Jackson

Bob ~~Eymore~~ ~~Eyrom~~ Eymen

Cascle Diane Peters. cono stone clerk became acctnt w/ Idea

Robert Peters

Bobby T Adkins

Roger S Pettit

Mark Hearne BASF decision maker

trips w/ Seward to

Registered Agent - Robert Millis

told Larry Bullard he was acctn for

both, not sure which he was good for,

& moving money back & forth

BASF

Ron/ ~~Larry~~ Moore - billed for waste water disposal & 0 reported to TNRCC

Bellinger

Stanbury

File something to get 6 of testimony

Subpoena records of Caleb Bull —

Corp Ejt law

Lucas [redacted] Castleberry 72/2 270

US v Gibson 426 F Supp 76

Ind Manis Offing TxAG

T/C Ron Barclay:

Civil - TNRCC + City 1/2 + 1/2
Crim all to City

TNRCC Health & safety - double jeopardy

Disp of waste water
Control office -

June 12th PT on crim case
Code of crim procedure can collect like civil

~~60 Pct Eng~~
~~/~~
~~Our Expert~~

~~Sudden flooding &~~
~~blamed~~
~~Eng firm~~

~~Prosecution~~
~~Civic Assoc~~
~~Subdiv -~~

10:00 -
Tyme
Registered engrs made admission

MEMO

To: Bill Eggleston
From: Margaret Cox
Subject: Civil Conspiracy
Date: June 12, 1998

Question: Do you have to have a conspirator corroborate the acts of the other conspirator to prove a civil conspiracy?

Answer: No, I have not found corroboration as a requirement to prove a civil conspiracy in any Texas cases.

In *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60, 70 (Tex.App.--Houston [14th Dist.] 1996, writ granted), the court outlines the elements of civil conspiracy: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; (5) damages as a proximate result. The court goes on to state: "[b]ecause of its nature, proof of conspiracy usually must be made by circumstantial evidence. . . . A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved." *Id.* at 72.

In all the cases on civil conspiracy in Texas not one mentions corroboration. The majority say that a civil conspiracy may be proven by circumstantial evidence. I chose the *Operation Rescue* case because it outlines the elements of a civil conspiracy and how to prove them. I have attached the case and marked where the sections on conspiracy are. If you need anything more specific please let me know.

*60 937 S.W.2d 60

OPERATION RESCUE-NATIONAL, Rescue America, Dallas Rescue, Philip L. "Flip" Benham, Bob Jewitt, Keith Tucci, and Don Treshman, Appellants,

v.

PLANNED PARENTHOOD OF HOUSTON AND SOUTHEAST TEXAS, INC., West Loop Clinic, A-Z Women's Health Services, Downtown Women's Clinic, Houston Women's Clinic, Women's Pavilion, Women's Medical Center of N.W. Houston, AAA Concerned Women's Center, Aaron's Family Planning Clinic of Houston, Suburban Women's Clinic, Dr. Jerry Edwards, Dr. Robert P. Kaminsky, Dr. Doug Karpen, Dr. Bernard Rosenfeld, Dr. John Coleman, and Dr. Adebayo Adesomo, Appellees.

No. 14-95-00363-CV.
Court of Appeals of Texas,
Houston (14th Dist.).
Dec. 19, 1996.
Rehearing Overruled Jan. 23, 1997.

Doctors who performed abortions and ten women's clinics brought action against antiabortion groups and their leaders, seeking injunctive relief and damages in connection with abortion protest activities. The 333rd District Court, Harris County, Eileen O'Neill, Richard Bianchi, JJ., entered judgment on jury verdict finding defendants liable for civil conspiracy, tortious interference, and invasion of privacy and property rights, and awarded actual and punitive damages, as well as permanent injunctive relief. Defendants appealed. The Court of Appeals, Ross A. Sears, J. (Assigned), held that: (1) jury instruction on definition of civil conspiracy, together with damages questions, sufficiently encompassed elements of conspiracy; (2) evidence was sufficient to support injunctive relief granted; (3) permanent injunction did not violate defendants' free speech rights under Federal or State Constitutions; (4) evidence supported award of actual damages in total amount of $204,585; (5) evidence supported awards of punitive damages in total amount of $1,010,000; (6) defendants failed to show surprise by amendment of damages request after jury verdict but before rendition of judgment; (7) amendment of enforcement paragraph in injunction was permissible correction of "clerical error"; (8) trial court had authority to retax costs; and (9) there was no abuse of discretion in permitting plaintiffs to recover their costs.

Affirmed.

Amidei, J., dissented and filed separate opinion.

1. APPEAL AND ERROR ⚿1078(5)
   30 ----
   30XVI Review
   30XVI(K) Error Waived in Appellate Court
   30k1078 Failure to Urge Objections
   30k1078(5) To verdict, findings, or judgment.
Tex.App.-Houston [14 Dist.] 1996.
Abortion protestors, by failing to allege error in point of error, waived any complaint as to sufficiency of evidence supporting jury's findings that they participated in conspiracy to interfere with business of clinics providing abortion services and that they or their operatives tortiously interfered with clinics' business.

2. APPEAL AND ERROR ⚿230
   30 ----
   30V Presentation and Reservation in Lower Court of Grounds of Review
   30V(B) Objections and Motions, and Rulings Thereon
   30k230 Necessity of timely objection.
Tex.App.-Houston [14 Dist.] 1996.
By failing to object to trial court's refusal to strike objectionable jurors until after peremptory strikes were made, appellants waived any error.

3. APPEAL AND ERROR ⚿230
   30 ----
   30V Presentation and Reservation in Lower Court of Grounds of Review
   30V(B) Objections and Motions, and Rulings Thereon
   30k230 Necessity of timely objection.

[See headnote text below]

3. APPEAL AND ERROR ⚿231(1)
   30 ----
   30V Presentation and Reservation in Lower Court of Grounds of Review
   30V(B) Objections and Motions, and Rulings Thereon
   30k231 Necessity of Specific Objection
   30k231(1) In general.

Tex.App.-Houston [14 Dist.] 1996.
To preserve error in trial court's failure to strike objectionable jurors, complaining party must timely bring its complaint to trial court's attention before making its peremptory challenges; objecting party must specifically inform trial court which objectionable jurors will remain after all peremptory strikes are made, and that notice must be given before actual exercise of strikes.

4. TRIAL ⚿219
388 ----
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k219 Definition or explanation of terms.
Tex.App.-Houston [14 Dist.] 1996.
Trial court has broad discretion in submitting explanatory instructions and definitions.

5. APPEAL AND ERROR ⚿215(1)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k215 Objections in General
30k215(1) Necessity of objection in general.

[See headnote text below]

5. APPEAL AND ERROR ⚿230
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 Necessity of timely objection.

[See headnote text below]

5. APPEAL AND ERROR ⚿242(1)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
To preserve error in jury charge, party must make trial court aware of complaint, timely and plainly, and obtain ruling. Vernon's Ann.Texas Rules Civ.Proc., Rule 274.

6. APPEAL AND ERROR ⚿230
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 Necessity of timely objection.
Tex.App.-Houston [14 Dist.] 1996.
In order to preserve error in jury charge, objections must be made before charge is read to jury. Vernon's Ann.Texas Rules Civ.Proc., Rule 272.

7. APPEAL AND ERROR ⚿216(7)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k216 Requests and Failure to Give Instructions
30k216(7) Sufficiency of requests and questions raised.

[See headnote text below]

7. APPEAL AND ERROR ⚿928(4)
30 ----
30XVI Review
30XVI(G) Presumptions
30k928 Instructions
30k928(4) Requests and rulings thereon.
Tex.App.-Houston [14 Dist.] 1996.
Appellants properly preserved complaints that jury charge on civil conspiracy was erroneous in failing to include requirement that acts to further conspiracy be "overt" and "unlawful," and that instruction was fatally flawed for failure to include requirement that there be damages proximately resulting from conspiracy; at charge conference, appellants objected that instruction did not require "unlawful overt act," and that there was no element of damages included in cause of action, it could be presumed that objection was overruled, as trial court made no change in charge, and appellants were not required to submit substantially correct instruction, such that omission of term "unlawful" in tendered question was not fatal to preservation of error.

8. APPEAL AND ERROR ⚿928(4)
30 ----

30XVI Review
30XVI(G) Presumptions
30k928 Instructions
30k928(4) Requests and rulings thereon.
Tex.App.-Houston [14 Dist.] 1996.
When objection t· *6 jury charge is made and court makes no change in charge, it is presumed that objection was properly and timely presented and that objection was overruled.

9. APPEAL AND ERROR ⚿218.2(3.1)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k218 Verdict and Findings by Jury
30k218.2 Special Interrogatories and Findings
30k218.2(3) Nature of Interrogatory or Finding
30k218.2(3.1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Defendants failed to preserve error as to claim that defective definition of civil conspiracy infected jury's answers on liability and damages in jury questions; no objections were made by any defendant to those questions because of allegedly erroneous conspiracy definition.

10.APPEAL AND ERROR ⚿232(.5)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k232 Scope and Effect of Objection
30k232(.5) In general.
Tex.App.-Houston [14 Dist.] 1996.
Party cannot enlarge on appeal objection made in trial court.

11.APPEAL AND ERROR ⚿232(.5)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k232 Scope and Effect of Objection
30k232(.5) In general.
Tex.App.-Houston [14 Dist.] 1996.
Objection on appeal that is not same as that urged at trial presents nothing for review.

12.CONSPIRACY ⚿21
91 ----
91I Civil Liability
91I(B) Actions
91k21 Trial.
Tex.App.-Houston [14 Dist.] 1996.
Trial court did not err in submitting damages separately from jury instruction defining civil conspiracy; question regarding injury, harm or damages was predicated on affirmative answer to liability questions on conspiracy. Vernon's Ann.Texas Rules Civ.Proc., Rule 277.

13.CONSPIRACY ⚿6
91 ----
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k1 Nature and Elements in General
91k6 Damage caused.
Tex.App.-Houston [14 Dist.] 1996.
Gist of civil conspiracy is injury that is intended to be caused.

14.CONSPIRACY ⚿21
91 ----
91I Civil Liability
91I(B) Actions
91k21 Trial.
Tex.App.-Houston [14 Dist.] 1996.
Deviation in jury charge from elements of civil conspiracy set forth by Supreme Court, particularly addition of requirement that jury find "at least one act to further the conspiracy," was not error; according to court's instructions, jury was required to find act furthering defendants' "unlawful purpose," or act forming "unlawful means" of accomplishing their conspiracy.

15.CONSPIRACY ⚿21
91 ----
91I Civil Liability
91I(B) Actions
91k21 Trial.
Tex.App.-Houston [14 Dist.] 1996.
Trial court, in instructing jury on definition of civil conspiracy, was not required to submit element of "overt, unlawful" act, as the only disputed issue was whether acts were part of conspiracy so that each coconspirator was responsible for all acts done by any of conspirators.

16.TRIAL ⚿295(1)
388 ----

388VII Instructions to Jury
388VII(G) Construction and Operation
388k295 Construction and Effect of Charge as a Whole
388k295(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
When error in jury charge is found, appellate court must review pleadings, evidence, and entire charge to determine if error was harmful.

17.APPEAL AND ERROR ⚿1064.1(2.1)
30 ----
30XVI Review
30XVI(J) Harmless Error
30XVI(J)18 Instructions
30k1064 Prejudicial Effect
30k1064.1 In General
30k1064.1(2) Particular Cases
30k1064.1(2.1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Any error in trial court's definition of civil conspiracy, which did not include requirement that acts furthering conspiracy have been "overt" and "unlawful," was harmless in action brought against abortion protestors in connection with their interference with access to homes and clinics of doctors who performed abortions; evidence supporting conspiracy to commit illegal acts, as well as commission of illegal acts, was overwhelming.

18.INJUNCTION ⚿130
212 ----
212III Actions for Injunctions
212k130 Trial or hearing.
Tex.App.-Houston [14 Dist.] 1996.
Question of imminent harm, for purposes of injunctive relief, is not proper issue to submit to jury, but is question for court to decide as court of equity.

19.JURY ⚿13(5.1)
230 ----
230II Right to Trial by Jury
230k13 Legal or Equitable Actions or Issues
230k13(5) Issues of Fact in Equitable Actions
230k13(5.1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Although litigant has right to trial by jury in equitable action, only ultimate issues of fact are submitted for jury's determination.

20.INJUNCTION ⚿14
212 ----
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k14 Irreparable injury.

[See headnote text below]

20.INJUNCTION ⚿123
212 ----
212III Actions for Injunctions
212k116 Pleading
212k123 Issues, proof, and variance.
Tex.App.-Houston [14 Dist.] 1996.
To be entitled to permanent injunctive relief, plaintiffs must plead and prove valid cause of action against defendants, must show that harm is imminent, and must establish that imminent harm will be irreparable if injunction is not issued.

21.APPEAL AND ERROR ⚿302(6)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k302 Sufficiency and Scope of Statement of Grounds
30k302(6) Sufficiency of evidence and amount of recovery.

[See headnote text below]

21.APPEAL AND ERROR ⚿758.1
30 ----
30XII Briefs
30k758 Specification of Errors
30k758.1 In general.
Tex.App.-Houston [14 Dist.] 1996.
Filing of motion for new trial, raising specific points as to sufficiency of evidence supporting jury's answers, is effective to preserve error for factual sufficiency point; separate point of error complaining of overruling of motion for new trial is duplicitous and unnecessary.

22.APPEAL AND ERROR ⚿901
30 ----
30XVI Review
30XVI(G) Presumptions
30k901 Burden of showing error.

[See headnote text below]

22.APPEAL AND ERROR ⚿1001(1)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and

Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) In general.

[See headnote text below]

22.APPEAL AND ERROR ⚿1003(7)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(7) Manifest weight of evidence.
Tex.App.-Houston [14 Dist.] 1996.
When party attacks finding concerning issue upon which it did not have burden of proof, party must demonstrate that there is insufficient evidence to support adverse finding; test is whether, after examining all evidence, evidence supporting finding is so slight, or evidence against it is so strong, that finding is manifestly unjust and clearly wrong.

23.APPEAL AND ERROR ⚿1008.1(2)
30 ----
30XVI Review
30XVI(I) Question *6(of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(2) Same effect as verdict.
Tex.App.-Houston [14 Dist.] 1996.
Trial court's findings of fact have same force and dignity as jury's verdict upon jury questions and are reviewable for sufficiency of evidence by same standards as are applied in reviewing evidence supporting jury's answers.

24.APPEAL AND ERROR ⚿842(2)
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(2) Findings of fact and conclusions of law.
Tex.App.-Houston [14 Dist.] 1996.
Although trial court's conclusions of law may not be challenged for factual insufficiency, trial court's conclusions drawn from facts may be reviewed to determine their correctness.

25.EVIDENCE ⚿587
157 ----
157XIV Weight and Sufficiency
157k587 Circumstantial evidence.
Tex.App.-Houston [14 Dist.] 1996.
Any ultimate fact may be proven by circumstantial evidence.

26.INJUNCTION ⚿128(4)
212 ----
212III Actions for Injunctions
212k124 Evidence
212k128 Weight and Sufficiency
212k128(3) Property, Conveyances, and Incumbrances
212k128(4) Trespass or other injury to real property.
Tex.App.-Houston [14 Dist.] 1996.
Permanent injunction against abortion protestors, prohibiting them from interfering with access to homes and clinics of doctors who performed abortions, was supported by evidence of conspiracy to interfere with business, property and privacy rights of clinics and doctors, which threatened imminent, irreparable harm; protestors had engaged in blockades, used aggressive "sidewalk counseling" by yelling, screaming and following patients at clinics, made death threats, engaged in fire bombing and acid attacks, and picketed doctors' homes, psychologists testified as to harmful psychological and emotional effects on staff and patients of clinics, and there was evidence that threats of violence, interference, and invasion of personal and property rights continued up to and during trial.

27.INJUNCTION ⚿22
212 ----
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k20 Defenses or Objections to Relief
212k22 Injunction ineffectual or not beneficial; mootness.
Tex.App.-Houston [14 Dist.] 1996.
Party seeking injunction must establish that defendant will engage in activity enjoined.

28.INJUNCTION ⚿12
212 ----
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k12 Injury sustained or anticipated.

Tex.App.-Houston [14 Dist.] 1996.

In making determination of imminent harm, for purposes of determining appropriateness of injunctive relief, trial court may determine that, when violations are shown up to or near date of trial, defendant has engaged in course of conduct and court may assume that it will continue, absent clear proof to contrary; probability of continuation of prohibited practices is not subject to direct proof, and injunctive relief is proper when trial court finds it justified under rules of equity, notwithstanding defendants' cessation of activity or promise to cease activity.

29.CIVIL RIGHTS ⚿450
78 ----
78III State Remedies
78k448 Civil Actions
78k450 Injunction.
Tex.App.-Houston [14 Dist.] 1996.

Violation of constitutionally guaranteed right inflicts irreparable injury warranting injunctive relief.

30.INJUNCTION ⚿12
212 ----
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k12 Injury sustained or anticipated.
Tex.App.-Houston [14 Dist.] 1996.

Disruption of business constitutes type of harm for which injunction may issue.

31.CONSPIRACY ⚿13
91 ----
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k12 Persons Liable
91k13 In general.
Tex.App.-Houston [14 Dist.] 1996.

It is not essential that each conspirator be shown to have acted in concert with his coconspirators but, rather, once civil conspiracy is proven, each conspirator is responsible for acts done by any other conspirator to further conspiracy.

32.EVIDENCE ⚿588
157 ----
157XIV Weight and Sufficiency
157k588 Credibility of witnesses in general.
Tex.App.-Houston [14 Dist.] 1996.

Jury, as sole judge of credibility of witnesses and weight to be given their testimony, was free to disregard testimony of any witness and resolve inconsistencies in testimony.

33.ABORTION AND BIRTH CONTROL ⚿0.5
4 ----
4k0.5 Right to abortion and regulation thereof.

[See headnote text below]

33.CONSTITUTIONAL LAW ⚿90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.
Tex.App.-Houston [14 Dist.] 1996.

Buffer zones established by injunction prohibiting abortion protestors from interfering with access to homes and clinics of doctors who performed abortions were least restrictive means and were essential to preserve right of clinic access, thus satisfying free speech protections of First Amendment and State Constitution; width and breadth of each zone varied widely depending on physical characteristics and locations of each clinic, ranging from 15 to 32 feet, depending upon particular requirements for adequate access. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

34.CONSTITUTIONAL LAW ⚿90(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(1) In general.

[See headnote text below]

34.CONSTITUTIONAL LAW ⚿90(3)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) Limitations on doctrine in general.
Tex.App.-Houston [14 Dist.] 1996.

Texas Constitution's broad command that "[e]very person shall be at liberty to speak ... opinions on any subject" provides greater rights of free expression than First Amendment of Federal Constitution and, thus, restraints on expression may be imposed only if injunctive relief granted encompasses least restrictive means of protecting against alleged imminent and irreparable harm caused by expression. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1 § 8.

35.CONSTITUTIONAL LAW ⚖90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Standards of review for constitutionality of injunction prohibiting abortion protestors from interfering with access to homes and clinics of doctors who performed abortions were essentially same under both First Amendment and State Constitution; buffer zone injunction had to "burden no more speech than necessary" and be "least restrictive means" to protect unimpeded access to clinics and residences. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1 § 8.

36.CIVIL RIGHTS ⚖450
78 ----
78III State Remedies
78k448 Civil Actions
78k450 Injunction.
Tex.App.-Houston [14 Dist.] 1996.
Governmental interests were sufficiently significant to justify and demand injunctive rel *61 against abortion protestors, prohibiting them from interfering with access to homes and clinics of doctors who performed abortions; those interests included woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, ensuring public safety and order, promoting free flow of traffic on public streets and sidewalks, protecting property rights of citizens, and protecting residential and medical privacy. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

37.CONSTITUTIONAL LAW ⚖90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.

[See headnote text below]

37.INJUNCTION ⚖189
212 ----
212V Permanent Injunction and Other Relief
212k189 Nature and scope of relief.
Tex.App.-Houston [14 Dist.] 1996.
Injunction against abortion protestors demonstrating within buffer zones around clinics was not unconstitutionally overbroad on ground that it banned all speech included within term "demonstrating." U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

38.CONSTITUTIONAL LAW ⚖90.1(4)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(4) Use of streets and public places; licenses and permits.

[See headnote text below]

38.INJUNCTION ⚖189
212 ----
212V Permanent Injunction and Other Relief
212k189 Nature and scope of relief.
Tex.App.-Houston [14 Dist.] 1996.
Abortion protestors' free speech rights were not violated by injunction's ban on picketing, patrolling, or demonstrating within zones along entire street edge of property of physicians performing abortions, extending 13 feet from property line into street where residence was located; injunction prohibited protests in small zone in front of each physicians' residence, and there were time limits within each 24-hour period and limits on sound amplification within 100 feet of residences. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

39.CONSTITUTIONAL LAW ⚖90(3)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90(3) Limitations on doctrine in general.
Tex.App.-Houston [14 Dist.] 1996.
Speech restriction is narrowly tailored, for purposes of First Amendment analysis, if it eliminates no more than exact source of evil it seeks to remedy. U.S.C.A. Const.Amend. 1.

40.CONSTITUTIONAL LAW ⚖90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
First Amendment permits government to prohibit offensive speech as intrusive when captive audience cannot avoid objectionable speech. U.S.C.A.

Const.Amend. 1.

41.CONSTITUTIONAL LAW ⚷90.1(1)
92 ----
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Supreme Court applies somewhat more stringent application of First Amendment principles when evaluating injunctive order than it does when content-neutral, generally applicable statute is reviewed and, thus, injunction must burden no more speech than necessary to serve significant government interest. U.S.C.A. Const.Amend. 1.

42.APPEAL AND ERROR ⚷219(2)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) Findings of fact and conclusions of law.
Tex.App.-Houston [14 Dist.] 1996.
By failing to request additional findings, abortion protestors waived any right to complain about omitted or incorrect findings in support of injunctive relief. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

43.APPEAL AND ERROR ⚷219(2)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) Findings of fact and conclusions of law.
Tex.App.-Houston [14 Dist.] 1996.
When part of cause is decided by jury and part by court, party appealing court-decided issue should request findings of fact and conclusions of law in order to preserve findings for review. Vernon's Ann.Texas Rules Civ.Proc., Rule 296.

44.INJUNCTION ⚷204
212 ----
212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 Form and requisites.
Tex.App.-Houston [14 Dist.] 1996.
Requirements of rule governing injunction are mandatory and must be strictly followed, including provision requiring that orders granting injunction set forth reasons for its issuance, be specific in terms, and describe in reasonable detail and not by reference to complaint or other document act or acts sought to be restrained. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

45.INJUNCTION ⚷204
212 ----
212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 Form and requisites.
Tex.App.-Houston [14 Dist.] 1996.
Findings of fact are not required to challenge validity of injunctive order that fails to state reason for its issuance. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

46.INJUNCTION ⚷204
212 ----
212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 Form and requisites.
Tex.App.-Houston [14 Dist.] 1996.
While every order granting injunction must set forth reasons for its issuance in order itself, if enjoined party wishes additional, detailed findings, that party may make request under rules of procedure governing findings of fact generally. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

47.APPEAL AND ERROR ⚷219(2)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) Findings of fact and conclusions of law.
Tex.App.-Houston [14 Dist.] 1996.
Where enjoined party fails to request additional or amended findings after court files its original findings, that party waives right to complain on appeal that findings were not full and complete or that court failed to enter additional findings of fact. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

48.INJUNCTION ⚷204
212 ----

212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 Form and requisites.
Tex.App.-Houston [14 Dist.] 1996.

Injunctive order prohibiting abortion protestors from interfering with access to homes and clinics of doctors who performed abortions adequately stated specific reasons for its issuance; court found that protestors had continued their activities despite existing injunctions, concluded that they were likely to continue to engage in their tortious conduct absent injunctive relief, and detailed specific, narrowly tailored zone around each clinics' entrance. Vernon's Ann.Texas Rules Civ.Proc., Rule 683.

49.APPEAL AND *60 ERROR ⚿219(2)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k219 Trial, Decision, and Findings by Court
30k219(2) Findings of fact and conclusions of law.
Tex.App.-Houston [14 Dist.] 1996.

New trial motion could not be construed as timely request for additional findings, so as to preclude finding of waiver of challenge to findings supporting injunction against abortion protestors. Vernon's Ann.Texas Rules Civ.Proc., Rules 296, 298.

50.APPEAL AND ERROR ⚿931(3)
30 ----
30XVI Review
30XVI(G) Presumptions
30k931 Findings of Court or Referee
30k931(3) Implied findings in general.
Tex.App.-Houston [14 Dist.] 1996.

Absent request for additional findings in support of injunctive relief, omitted findings will be presumed in support of judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 296.

51.CONSPIRACY ⚿20
91 ----
91I Civil Liability
91I(B) Actions
91k20 Damages.

[See headnote text below]

51.DAMAGES ⚿137
115 ----
115VII Inadequate and Excessive Damages
115k136 Injuries to Property
115k137 In general.
Tex.App.-Houston [14 Dist.] 1996.

Evidence in action for interference with business relations and civil conspiracy supported damage award in amount of $204,585 against abortion protestors, despite their claims that it was not known who committed acts of vandalism necessitating repairs to clinic at which abortions were performed, that damages were excessive, and that other costs on which damages were based were associated with increased security measures and not properly recompensable as items of damages; evidence demonstrated that protestors acted intentionally to shut down clinics and to keep patients away, it was foreseeable that clinic would be forced to respond to threats and acts of vandalism with appropriate security measures, and witness testified that changes made were essential to continued clinic operation.

52.DAMAGES ⚿20
115 ----
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k20 Natural and probable consequences of torts.
Tex.App.-Houston [14 Dist.] 1996.

In action for interference with business relations, plaintiff may recover such damages as are natural and proximate consequence of interference.

53.CONSPIRACY ⚿20
91 ----
91I Civil Liability
91I(B) Actions
91k20 Damages.
Tex.App.-Houston [14 Dist.] 1996.

Plaintiff is entitled to recover all damages that naturally flow from civil conspiracy.

54.APPEAL AND ERROR ⚿232(3)
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k232 Scope and Effect of Objection
30k232(3) Instructions.
Tex.App.-Houston [14 Dist.] 1996.

Abortion protestors' challenge to award of punitive damages based only on conspiracy, on ground that jury did not award specific actual damages caused by protestors' conduct in maliciously engaging in conspiracy to interfere with business of clinics performing abortions, was waived absent objection to jury charge on basis that damages could result from either conspiracy or wrongful interference with clinics; damages questions were predicated on affirmative answer to either conspiracy finding or finding of wrongful interference. Vernon's Ann.Texas Rules Civ.Proc., Rule 274.

55.DAMAGES ⚿94
115 ----
115V Exemplary Damages
115k94 Amount of exemplary damages.
Tex.App.-Houston [14 Dist.] 1996.
Awards of punitive damages against antiabortion groups and their leaders totaling $1,010,000, were supported by evidence; amount of actual damages awarded was $204,585, there was evidence that defendants had engaged in fire bombing, acid attacks, and death threats in effort to prevent abortions, amounts found against individual defendants were substantially less than those against groups, and jury awarded $5,000 additional punitive damages over and above amount originally requested against one group and its leader, for whom there was abundant evidence of involvement in organizing protests and encouraging acts of vandalism.

56.APPEAL AND ERROR ⚿1182
30 ----
30XVII Determination and Disposition of Cause
30XVII(E) Rendition, Form, and Entry of Judgment
30k1182 Form and requisites.
Tex.App.-Houston [14 Dist.] 1996.
When appellate court conducts factual sufficiency review of punitive damages award, it must detail relevant evidence in its opinion as to why evidence supports or does not support punitive damages in light of five factors: nature of wrong; character of conduct involved; degree of culpability of wrongdoer; situation and sensibilities of parties concerned; and extent to which such conduct offends public sense of justice and propriety.

57.DAMAGES ⚿94
115 ----
115V Exemplary Damages
115k94 Amount of exemplary damages.
Tex.App.-Houston [14 Dist.] 1996.
Exemplary damages must be reasonably proportioned to actual damages.

58.APPEAL AND ERROR ⚿230
30 ----
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 Necessity of timely objection.

[See headnote text below]

58.APPEAL AND ERROR ⚿882(19)
30 ----
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k882 Error Committed or Invited by Party Complaining
30k882(19) Amount of recovery or extent of relief.
Tex.App.-Houston [14 Dist.] 1996.
Absent objection, prior to verdict, to participation in punitive damages deliberations by two jurors who did not join in verdict on actual damages, complaint was waived; appellants in fact demanded the participation by the two dissenting jurors. Rules App.Proc., Rule 52(a).

59.APPEAL AND ERROR ⚿1073(7)
30 ----
30XVI Review
30XVI(J) Harmless Error
30XVI(J)23 Judgment or Order
30k1073 Judgment or Order
30k1073(7) Amount.
Tex.App.-Houston [14 Dist.] 1996.
Any error in participation in punitive damages deliberations by two jurors who did not join in verdict on actual damages was harmless, as same ten jurors that voted to award actual damages found punitive damages.

60.INJUNCTION ⚿121
212 ----
212III Actions for Injunctions
212k116 Pleading
212k121 Amended and supplemental pleadings.
Tex.App.-Houston [14 Dist.] 1996.
Abortion protestors failed to show that they were surprised by clinic's amendment of its damages request

after jury verdict but prior to rendition of judgment and, thus, permitting prejudgment amendment to pleadings was not abuse of discretion; jury awarded $5,000 additional punitive damages, above amount requested, against two protestors. Vernon's Ann.Texas Rules Civ.Proc., Rule 47.

61.PLEADING ⚿48
302 ----
302II Declaration, Complaint, Petition, or Statement
302k48 Statement of cause of action in general.
Tex.App.-Houston [14 Dist.] 1996.
Pleading is sufficient when it gives fair and adequate notice of facts upon which pleader bases its claim.

62.PLEADING ⚿48
302 ----
302II Declaration, Complaint, Petition, or Statement
***60** 302k48 Statement of cause of action in general.
Tex.App.-Houston [14 Dist.] 1996.
Purpose of rule requiring pleading setting forth claim for relief to give fair notice of claim involved and to state that damages sought are within jurisdictional limits of court is to give opposing party information sufficient to enable him to prepare defense. Vernon's Ann.Texas Rules Civ.Proc., Rule 47.

63.PLEADING ⚿236(3)
302 ----
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k236 Discretion of Court
302k236(3) During trial.
Tex.App.-Houston [14 Dist.] 1996.
Trial court has no discretion to deny trial amendment to pleading unless appellants demonstrate surprise. Vernon's Ann.Texas Rules Civ.Proc. Rules 63, 66.

64.APPEAL AND ERROR ⚿1079
30 ----
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 Insufficient discussion of objections.
Tex.App.-Houston [14 Dist.] 1996.
Absent citation of authority in support of claim that trial court's failure to include "take-nothing" provisions in judgment was reversible error, claim was waived.

65.APPEAL AND ERROR ⚿1079
30 ----
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 Insufficient discussion of objections.
Tex.App.-Houston [14 Dist.] 1996.
Unsupported points of error are waived.

66.INJUNCTION ⚿210
212 ----
212VI Writ, Order, or Decree
212k207 Final Judgment or Decree
212k210 Opening and vacating or modifying.
Tex.App.-Houston [14 Dist.] 1996.
Change in enforcement paragraph of injunction, adding "any officer, agent, servant, employee, attorney, or person acting in active concert with defendant, who has actual notice of order," was permissible correction of "clerical error"; correction was necessary for consistency with injunctive order section of judgment, and to comply with terms of rule governing injunctions. Vernon's Ann.Texas Rules Civ.Proc., Rules 316, 329b(h), 683.

See publication Words and Phrases for other judicial constructions and definitions.

67.JUDGMENT ⚿297
228 ----
228VIII Amendment, Correction, and Review in Same Court
228k296 Authority of Court, Judge, or Judicial Officer
228k297 In general.

[See headnote text below]

67.JUDGMENT ⚿306
228 ----
228VIII Amendment, Correction, and Review in Same Court
228k302 Nature of Errors or Defects
228k306 Clerical errors.
Tex.App.-Houston [14 Dist.] 1996.
"Clerical error" is mistake or omission that prevents judgment as entered from reflecting judgment as rendered, and trial court may correct such clerical mistake even if it has lost plenary jurisdiction. Vernon's Ann.Texas Rules Civ.Proc., Rules 316, 329b(h).

See publication Words and Phrases for other judicial constructions and definitions.

68.JUDGMENT ⚿273(3)
228 ----
228VII Entry, Record, and Docketing
228k273 Entry Nunc Pro Tunc
228k273(3) Errors or irregularities in previous entry.
Tex.App.-Houston [14 Dist.] 1996.
Inadvertent failure to attach exhibits to judgment was "clerical error," not "judicial error," and trial court therefore could properly enter judgment nunc pro tunc after expiration of its plenary power in order to correct error. Vernon's Ann.Texas Rules Civ.Proc., Rules 316 , 329b(h).

See publication Words and Phrases for other judicial constructions and definitions.

69.COSTS ⚿32(2)
102 ----
102I Nature, Grounds, and Extent of Right in General
102k32 Prevailing or Successful Party in General
102k32(2) Who is prevailing party in general.
Tex.App.-Houston [14 Dist.] 1996.
"Successful party" entitled by rule to recover costs from its adversary is one who obtains judgment of competent court vindicating civil claim of right. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

See publication Words and Phrases for other judicial constructions and definitions.

70.APPEAL AND ERROR ⚿984(1)
30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) In general.

[See headnote text below]

70.COSTS ⚿60
102 ----
102I Nature, Grounds, and Extent of Right in General
102k59 Apportionment
102k60 In general.
Tex.App.-Houston [14 Dist.] 1996.
Allocation of costs is matter for trial court's discretion and cannot be overturned absent showing of abuse. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

71.COSTS ⚿146
102 ----
102VII Amount, Rate, and Items
102k146 Nature and amount of items in general.
Tex.App.-Houston [14 Dist.] 1996.
Court may not adjudge costs other than as provided by rule unless good cause is shown. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

72.COSTS ⚿12
102 ----
102I Nature, Grounds, and Extent of Right in General
102k11 Discretion of Court
102k12 In general.
Tex.App.-Houston [14 Dist.] 1996.
Absent explanation for assessing costs contrary to governing rule, trial court abuses its discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

73.COSTS ⚿198
102 ----
102IX Taxation
102k198 Form and requisites of application in general.

[See headnote text below]

73.COSTS ⚿214
102 ----
102IX Taxation
102k211 Remedies for Erroneous Taxation
102k214 Motion for retaxation.
Tex.App.-Houston [14 Dist.] 1996.
"Motion to adjudge costs" involves assessment by court as to who shall pay costs, while "motion to retax costs" involves question of amount of costs assessed; motion to retax costs is one to correct ministerial act of clerk of court in tabulating costs.

See publication Words and Phrases for other judicial constructions and definitions.

74.APPEAL AND ERROR ⚿758.1
30 ----
30XII Briefs
30k758 Specification of Errors
30k758.1 In general.
Tex.App.-Houston [14 Dist.] 1996.
Where complaint is made of ruling of court in adjudging costs against wrong party, error is inherent in judgment and must be properly assigned, just as any other alleged error.

75.COSTS ⚿216
102 ----
102IX Taxation
102k211 Remedies for Erroneous Taxation
102k216 Retaxation by court on motion or appeal.
Tex.App.-Houston [14 Dist.] 1996.
Trial court had authority to retax costs against defendants, even though more than 30 days had elapsed from time defendants' motion for new trial was overruled.

76.COSTS ⚿195
102 ----
102IX Taxation
102k195 Nature of proceeding.

[See headnote text below]

76.COSTS ⚿214
102 ----
102IX Taxation
102k211 Remedies for Erroneous Taxation
102k214 Motion for retaxation.
Tex.App.-Houston [14 Dist.] 1996.
Taxing of costs, as distinguished from adjudication of costs, is merely ministerial duty of clerk, and thus error may be corrected upon injured party's motion, even after case has been disposed of on appeal, as long as request is made before mandate issues and costs are paid.

77.COSTS ⚿154
102 ----
102VII Amount, Rate, and Items
102k154 Depositions and affidavits.

[See headnote text below]

77.COSTS ⚿176
102 ----
102VII Amount, Rate, and Items
102k176 Service of process.

[See headnote text below]

77.COSTS ⚿178
102 ----
102VII Amount, Rate, and ***60** Items
102k178 Demonstrative evidence, experiments, surveys, and views.

[See headnote text below]

77.COSTS ⚿189
102 ----
102VII Amount, Rate, and Items
102k189 Stenographers' fees.

[See headnote text below]

77.COSTS ⚿190
102 ----
102VII Amount, Rate, and Items
102k190 Printing or other reproduction of papers, exhibits, or evidence.
Tex.App.-Houston [14 Dist.] 1996.
It was not abuse of discretion to permit women's clinics and doctors who performed abortions to recover their costs in successful action against abortion protestors, particularly costs for citing by publication 10,000 John and Jane Doe defendants who were later nonsuited, for transcript of hearing on temporary injunction, for transcripts of four depositions taken by defendants, for rental of television and video recorder, for copies of videotapes, for photos of clinics and residences, for service of citation on eight defendants by private process servers, and for service of subpoenas; all of costs were necessary to conduct of trial, and most expenditures were specifically ordered by trial court. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

78.COSTS ⚿154
102 ----
102VII Amount, Rate, and Items
102k154 Depositions and affidavits.
Tex.App.-Houston [14 Dist.] 1996.
Deposition expenses are properly chargeable as court costs. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

79.COSTS ⚿176
102 ----
102VII Amount, Rate, and Items
102k176 Service of process.
Tex.App.-Houston [14 Dist.] 1996.
Subpoena and citation fees are recoverable as court costs. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

***67** Jay Alan Sekulow, Washington, Cactus Jack Cagle, Houston, James Austin Pinedo, San Antonio, Richard W. Schmude, Tomball, for appellants.

Kathy D. Patrick, Neal S. Manne, Collyn A. Peddie, Houston, for appellees.

Before AMIDEI, ANDERSON and SEARS, (FN*) JJ.

MAJORITY OPINION

SEARS, Justice (Assigned).

[1] This appeal is from a judgment awarding damages and permanently enjoining appellants, anti-abortion groups and their leaders, from interfering with access to appellees' homes and clinics. Appellees are ten women's clinics and several doctors who sometimes perform abortions. Based upon the jury's findings that appellants were liable for civil conspiracy, tortious interference, invasion of privacy and property rights, the judgment awarded actual and punitive damages to appellee Planned Parenthood of Houston and Southeast Texas, Inc. ("Planned Parenthood"). Appellants, Philip "Flip" Benham and Bob Jewitt, are referred to as "B/J," and appellants, Operation Rescue-National, Rescue America, Dallas Rescue, Don Treshman and Keith Tucci, are collectively referred to as "OR." In separate briefs, B/J raise thirty-seven points of error and OR raise fifty-four points, for a total of ninety-one points of error, many of which overlap. Both groups contend the permanent injunction violates both the Texas and United States Constitutions. They also attack the sufficiency of the evidence to substantiate the trial court's findings supporting the injunctive relief. They complain of errors in the jury instructions, in the composition of the jury, in the amended and corrected judgments, and in the assessment of costs. In addition, OR challenge the sufficiency of the evidence supporting the actual and punitive damages imposed against them. (FN1) We affirm the judgment of the trial court.

Background

Appellants sought to interfere with the activities of Planned Parenthood and other family planning clinics in August 1992 during the Republican National Convention in Houston. *6 Don Treshman, the National Director of appellant Rescue America, announced a plan for a concerted, large-scale assault on Houston abortion providers. Treshman met with leaders of Operation Rescue-National before the GOP Convention. The groups agreed to jointly exert pressure on Planned Parenthood and other clinics to force them to close during the Convention. The primary tactic was conducting or sponsoring "rescues" which are blockades of clinics. In addition, Operation Rescue planned to promote residential pickets of physicians who worked at the clinics, and Rescue America was to coordinate information on these pickets. Pat Mahoney, a spokesman for Operation Rescue-National, acknowledged that the two groups had a common purpose and plan and were "all working toward a common goal." Appellants also announced their plan at a press conference.

In response, appellees and others filed suit and obtained a temporary restraining order (TRO) preventing appellants from coming within a 100-foot "buffer zone" of appellees' clinics and homes. Appellants Tucci, Benham and Jewitt, along with others who are not parties to this appeal, intentionally violated that part of the TRO barring demonstrations within the 100-foot zone around the clinics' entrances and exits, and they were jailed. All sought habeas relief, which the Texas Supreme Court granted. The supreme court held that the TRO imposing a 100-foot speech-free zone around the clinics' entrances and exits violated the protestors' constitutional right to freedom of expression because there was no showing the zone was the "least restrictive" means of protecting the clinics from harm *Ex parte Tucc* 859 S.W.2d 1, 7 (Tex.1993) (plurality opinion).

Appellees then amended their pleadings, sought a permanent injunction, and Planned Parenthood later asked for actual and punitive damages. Following a six-week jury trial and a two-day evidentiary hearing on the particulars of the proposed injunctive relief, Judge Eileen O'Neill of the 190th District Court signed a Judgment and Permanent Injunction on December 5, 1994. The judgment awarded the following damages to Planned Parenthood, plus pre- and post-judgment interest:

$204,585 in actual dam from Operation Rescue-National, Rescue America, Don Treshman, and Keith Tucci, jointly and severally; plus punitive damages as follows: $350,000 from Operation Rescue-National; $355,000 from Rescue America; $155,000 from Don Treshman; and $150,000 from Keith Tucci, fo **a total of $1,010,000 in punitive damages.**

The judgment permanently enjoined and restrained appellants from interfering with the clinics, harassing the physicians and their family members, and demonstrating within a specific zone as to each clinic and doctor's residence. These zones range from fifteen feet to thirty-two feet around the entrances to the clinics and are outlined on maps attached to the injunctive

order. The demonstration-free zones also extend thirteen feet from the property line in front of each physician's residence. The judgment incorporates the trial court's findings of fact and conclusions of law as to the injunctive relief.

After entry of the judgment, the cause was transferred to the 333rd District Court, where Judge Richard Bianchi signed an Amended Judgment and Permanent Injunction on February 1, 1995, to correct two errors in the judgment. Subsequently, on June 15, 1995, the same court entered a Judgment Nunc Pro Tunc and Permanent Injunction to include the attachment of exhibits inadvertently omitted from the Amended Judgment. This appeal resulted.

Jury Composition

[2] In their points forty-six and forty-seven, OR contend the trial court erred in refusing to strike certain jurors for cause, requiring them to use all of their peremptory challenges and accept jurors they found objectionable. B/J raise the same complaints in their points twenty-nine and thirty.

[3] To preserve error in the trial court's failure to strike objectionable jurors, the complaining party must timely bring its complaint to the trial court's attention before making its peremptory challenge *Hallett v. Houston Northwest Medical Center,* 689 *69 S.W.2d 888, 889-90 (Tex.1985). The objecting party must specifically inform the trial court which objectionable jurors will remain after all peremptory strikes are made, and this notice must be given before the actual exercise of the strik *Id; see Beavers v. Northrop Worldwide Aircraft Services,* 821 S.W.2d 669, 673 (Tex.App.--Amarillo 1991, writ denied); *Carpenter v. Wyatt Constr. Co.,* 501 S.W.2d 748, 750-51 (Tex.Civ.App.--Houston [14th Dist.] 1973, writ ref'd n.r.e.).

In this case, after the trial court excused several potential jurors for cause, the court overruled appellants' challenges for cause as to twenty-one additional venire members. The parties then made their peremptory strikes. Appellants did not object to the trial court's denial of their challenges for cause until after all parties had exercised their peremptory strikes and the jury was about to be sworn. They argued that two jurors about to be impaneled were objectionable and would have been challenged peremptorily if they could have done so. They then listed seven jurors on whom they would have used a peremptory strike, but they failed to fully articulate their objection and obtain a ruling. In addition, appellants did not seek additional peremptory challenges. By failing to object to the trial court's refusal to strike objectionable jurors until after the peremptory strikes were made, appellants have waived error, if any. B/J's points twenty-nine and thirty and OR's points forty-six and forty-seven are overruled.

Charge Error

In B/J's points of error four through seven and OR's points one through seven, appellants complain about alleged errors in Jury Instruction No. 2, which provided in relevant part:

> "*Civil conspiracy*' means a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. To find a civil conspiracy, you must find the following:
>
> 1. a combination of two or more persons,
>
> 2. who agree or have a meeting of the minds on a common purpose or course of action,
>
> 3. who have knowledge of the purpose or course of action, and
>
> 4. at least one of such persons commits at least one act to further the conspiracy.
>
> "Unlawful" means violative of either criminal or civil law.

[4] The trial court has broad discretion in submitting explanatory instructions and definitions. *Wisenbarger v. Gonzales Warm Springs Rehab. Hosp., In* 789 S.W.2d 688, 692 (Tex.App.--Corpus Christi 1990, writ denied). Instructions and definitions are proper when they are raised by the written pleadings, supported by the evidence, and they aid the jury in answering the questions in the charge. TEX.R. CIV. P. 277, 278.

[5] [6] To preserve error in the jury charge, a party must make the trial court aware of the complaint, timely and plainly, and obtain a ruling *State Dept. of Highways v. Payne,* 838 S.W.2d 235, 241 (Tex.1992); TEX.R. CIV. P. 274. A party is required to object when the court submits an erroneous question, instruction or definition. TEX.R. CIV. P. 27 *see,*

e.g., Spencer v. Eagle Star Ins. Co. 876 S.W.2d 154, 157 (Tex.1994). Objections must be made before the charge is read to the jury *Missouri Pac. R.R. Co. v. Cross,* 501 S.W.2d 868, 873 (Tex.1973); TEX.R. CIV. P. 272. If a submitted instruction is erroneous, it does not matter which party has the burden of proof. *Religious of the Sacred Heart v. City of Houston,* 836 S.W.2d 606, 613-14 (Tex.1992). A written request is required only when a question, instruction or definition is omitted. TEX.R. CIV. P. 278.

[7] Appellants contend the trial court's instruction on conspiracy is erroneous because it does not include a requirement that the acts to further the conspiracy be "overt" and "unlawful." In addition, they contend the instruction is fatally flawed because it failed to include a requirement that there be damages proximately resulting from the conspiracy.

[8] We reject appellees' contention that appellants failed to properly preserve all of its complaints about the charge. At the charge conference, appellants objected that *71 the instruction did not require an "unlawful overt act" and that there was no element of damages included in the cause of action. The attorney representing Benham and Jewitt objected to the definition in Instruction No. 2, and tendered another definition, which was refused. The parties stipulated at trial that objections made by one defendant were applicable to the others. Appellees contend Rescue America and Treshman have waived any complaint as to the conspiracy definition because their attorney did not receive a ruling. However, when an objection is made and the court made no change in the charge, it is presumed that the objection was properly and timely presented and that the objection was overruled *Acord v. General Motors Co.* 669 S.W.2d 111, 114 (Tex.1984); TEX.R. CIV. P. 272. In addition, appellants were only required to object to an erroneous instruction to preserve error; they were not required to submit a substantially correct instruction. Therefore, the fact that appellants' tendered question also omitted the term "unlawful" is not fatal to preservation of their challenge on appeal.

[9] [10] [11] However, we do agree that appellants failed to preserve error alleged in OR points three through seven and B/J points six and seven. In these points, appellants complain that the defective definition of conspiracy infected the jury's answers on liability and damages in Question Nos. 1 through 4 and 6 through 10. No objections were made by any defendant to these questions because of the allegedly erroneous conspiracy definition. A party cannot enlarge on appeal an objection made in the trial court. *Conner v. Bear* 630 S.W.2d 697, 701 (Tex.App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.). An objection on appeal that is not the same as that urged at trial presents nothing for review *Holland v. Hayden,* 901 S.W.2d 763, 765 (Tex.App.--Houston [14th Dist.] 1995, writ denied). Nor can a party raise a new objection for the first time on *Seeal.* TEX.R.APP. P. 52(a); TEX.R. CIV. P. 274. We overrule OR's points three through seven and B/J's points six and seven.

[12] First, as to the alleged failure to include a damages element in Instruction No. 2, we note that Question No. 3 asked: "Did any of the Plaintiff Clinics, Plaintiff Physicians, or Intervenors suffer injury, harm, or damages that were proximately caused by the conspiracy?" Question No. 3 was predicated on an affirmative answer to the liability questions on conspiracy to interfere with the business, privacy or property rights of appellees. Rule 277 expressly permits predication of damage questions on affirmative findings on liability. TEX.R. CIV. P. 277. We hold that the trial court did not err in submitting damages separately.

[13] The Texas Supreme Court has repeatedly defined a civil conspiracy as "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Firestone Steel Products Co. v. Baraja,* 927 S.W.2d 608, 614 (Tex.1996) *Triplex Communications, Inc. v. Riley,* 900 S.W.2d 716, 719 (Tex.1995) *Massey v. Armco Steel Co.* 652 S.W.2d 932, 934 (Tex.1983). The definition in this case is identical. The elements of the cause of action must be taken in the context of this basic definition stating that the object to be accomplished, or the means by which it is accomplished, is unlawful *Triplex Communications,* 900 S.W.2d at 720; *Massey,* 652 S.W.2d at 934. The "gist of a civil conspiracy" is the injury that is intended to be caused *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas C,* 435 S.W.2d 854, 856 (Tex.1968).

[14] I *Massey,* the Supreme Court listed the essential elements of civil conspiracy as: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result *Massey* 652 S.W.2d at 934. The instruction in this case is substantially the same,

except that it requires the jury to find "at least one act to further the conspiracy." When the elements submitted in this case are considered in the context of the basic conspiracy definition, we find no error in this slight deviation from the *Massey* elements. According to the court's instruction in this case, the jury was required to find an act furthering appellants' "unlawful *71 purpose," or an act forming the "unlawful means" of accomplishing their conspiracy.

[15] In addition, while not every act of protest described at trial was illegal, it was uncontroverted that one or more of appellants' actions were unlawful. The charge defined "unlawful" as "violative of either criminal or civil law." Appellants admitted many of their actions, at the very least, violated appellees' common law rights as well as the initial injunctive order. There is also no dispute that the actions at issue in this case were "overt." It was therefore established that some appellants committed overt, unlawful acts, and the onl ***disputed*** issue was whether these acts were part of a conspiracy so that each co-conspirator is responsible for all acts done by any of the conspirators. *See Carroll v. Timmers Chevrolet, Inc* 592 S.W.2d 922, 926 (Tex.1979). Since only t ***disputed*** issues must be submitted, the trial court was not required to submit the element of an "overt, unlawful" : *See T.O. Stanley Boot Co. v. Bank of El Paso* 847 S.W.2d 218, 223 (Tex.1992) (holding that only disputed issues must be submitted to the jury). *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex.1988) (same) *Kiel v. Brinkmat* 668 S.W.2d 926, 929 (Tex.App.--Houston [14th Dist.] 1984, no writ) (holding that the trial court did not err in submitting only one of three required elements when the other two were not disputed). We hold that the court's instruction, together with the damages questions, sufficiently encompassed the elements of conspiracy in this case.

[16] [17] When error in the charge is found, we must review the pleadings, evidence, and the entire charge to determine if the error is harmful *Island Recreational Dev. Corp. v. Republic of Texas Sav.* . 710 S.W.2d 551, 555 (Tex.1986). To reverse based on error in the charge, appellants must establish that the error amounted to such a denial of their rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment. TEX.R.APP. P. 81(b)(1). Here, the evidence supporting conspiracy to commit illegal acts, as well as the commission of illegal acts, was overwhelming. (FN2) Based on the testimony of the appellants and their admitted, illegal overt acts, the jury found appellants tortiously interfered with the clinics' business and violated the physicians' privacy rights. Therefore, even if we were to find that the trial court erred in its instruction on the conspiracy definition, we would find the error to be harmless.

In conclusion, we find no reversible error in the court's charge on conspiracy. B/J's points of error four and five and OR's points one and two are overruled.

[18] [19] Appellants also complain about the omission of a question or instruction on imminent harm relating to the injunctive relief in B/J point of error twenty-eight and OR point forty-five. The Texas Supreme Court has determined that the question of imminent harm is not a proper issue to submit to the jury, but instead is a question for the court to decide as a court of equi *State v. Texas Pet Fc* 591 S.W.2d 800, 804 (Tex.1979). Although a litigant has a right to trial by jury in an equitable action, only ultimate issues of fact are submitted for the jury's determination. *Ic* We overrule B/J point of error twenty-eight and OR point forty-five.

Injunctive Relief

[20] To be entitled to permanent injunctive relief, the plaintiffs must plead and prove a valid cause of action against the defendants. *See Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993) (holding that because Texas has no cause of action for negligent infliction of emotional distress, the trial court improperly entered a permanent injunctio *7 enjoining residential picketing). The plaintiffs must show that harm is imminent. *Henderson v. KRTS, Inc.*, 822 S.W.2d 769, 773 (Tex.App.--Houston [1st Dist.] 1992, no writ). They must also establish that this imminent harm will be irreparable if the injunction is not issue *Liberty Mut. Ins. Co. v. Mustang Tractor & Equip. Cc* 812 S.W.2d 663, 666 (Tex.App.--Houston [14th Dist.] 1991, no writ).

Appellants present a two-pronged attack on the injunctive relief granted by the trial court. First, we address their contention that the evidence is insufficient to support the injunctive relief granted by the trial court. Secondly, we consider appellants' contention that the permanent injunction violates both the United States and Texas Constitutions.

A. Sufficiency of the Evidence

[21] Appellants attack the sufficiency of the evidence

supporting the injunctive relief and the trial court's findings and conclusions. In response, appellees first assert that appellants have waived every factual sufficiency point of error, and any objection that damages were excessive, by failing to bring a *separate* point of error complaining of the trial court's overruling of their motion for new trial. To preserve error on factual sufficiency complaints, a party must include an objection in a motion for new trial *See* TEX.R. CIV. P. 324(b)(2), (b)(4 *Luna v. Southern Pacific Transp. Co* 724 S.W.2d 383, 384 (Tex.1987). Appellees argue that appellants must complain of the overruling of a motion for new trial by point of error when the objection, such as an objection to the factual sufficiency of the evidence, is made for the first time in the motion for new trial. Appellees cite no case authority directly on point, relying only o *O'Connor's Texas Rules * Civil Appeals* (1993). We find no other authority requiring such a strict interpretation of the briefing rules. We hold the filing of a motion for new trial, raising specific points in the motion as to the sufficiency of the evidence supporting the jury's answers, as appellants did in this case, is effective to preserve error for factual sufficiency points. A separate point of error complaining of the overruling of the motion for new trial is duplicitous and unnecessary.

[22] When a party attacks a finding concerning an issue upon which it did not have the burden of proof, it must demonstrate that there is insufficient evidence to support the adverse finding. *See Hickey v. Couchman,* 797 S.W.2d 103, 109-10 (Tex.App.--Corpus Christi 1990, writ denied). The test is whether, after examining all the evidence, the evidence supporting the finding is so slight, or the evidence against it so strong, that the finding is manifestly unjust and clearly wrong. *Plas-Tex, Inc. v. U.S. Steel Cor,* 772 S.W.2d 442, 445 (Tex.1989); *Garza v. Alvia* 395 S.W.2d 821, 823 (Tex.1965).

[23] [24] The trial court's findings of fact have the same force and dignity as a jury's verdict upon jury questions and are reviewable for sufficiency of the evidence by the same standards as are applied in reviewing the evidence supporting the jury's answers. *Zieben v. Plai* 786 S.W.2d 797, 799 (Tex.App.--Houston [14th Dist.] 1990, no writ; *City of Clute v. City of Lake Jaci* 559 S.W.2d 391, 395 (Tex.Civ.App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.). Although the court's conclusions of law may not be challenged for factual insufficiency, the trial court's conclusions drawn from the facts may be reviewed to determine their correct *Dallas County v. Sweitzer,* 881 S.W.2d 757, 763 (Tex.App.--Dallas 1994, writ denied).

[25] Any ultimate fact may be proven by circumstantial evidence *Transport Ins. Co. v. Faircloth,* 898 S.W.2d 269, 285 (Tex.1995). Because of its nature, proof of a conspiracy usually must be made by circumstantial evidence *King v. Acker* 725 S.W.2d 750, 755 (Tex.App.--Houston [1st Dist.] 1987, no writ) *Carr v. Hun* 651 S.W.2d 875, 882 (Tex.App.--Dallas 1983, writ ref'd n.r.e.). The jury was instructed in this case that:

> A fact may be established by direct or by circumstantial evidence. A fact is established by direct evidence when proved by documentary evidence or by [a] witness who saw the act done or the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

***73** [26] Appellants contend the evidence is insufficient to support the jury's finding that appellants conspired to violate, or actually violated, the doctors' privacy or property rights. They also argue the evidence is insufficient to support a finding of imminent harm to the doctors. In OR points of error eight through twenty-four, they assert the evidence is insufficient to show that appellants will engage in the enjoined activity in the future or that there was imminent risk of harm as to physician appellees. B/J essentially make the same argument in points eight through twenty. In points twenty-five through thirty, OR challenge each of the trial court's findings of fact supporting the permanent injunction. B/J's corresponding points are points twenty-one through twenty-six. The court's findings as to the injunctive relief are as follows:

1. Defendants' conduct threatens access to plaintiff clinics by women seeking abortion and other medical services;

2. Defendants' conduct threatens the use and enjoyment of plaintiff clinics' and physicians' property rights;

3. Defendants' aggressive and harassing manner of protesting and sidewalk counseling of clinic patients increases the medical risks attendant to the abortion procedure;

4. Defendants' targeted picketing of plaintiff

physicians' homes threatens and interferes with plaintiff physicians' rights of privacy;

5. Defendants have not abandoned their activities toward plaintiffs, but (1) remain committed to their particular protest tactics and would use them again toward plaintiffs if the circumstance (such as a national media event in Houston) presented itself; (2) have aided and abetted others in continuing to engage in conduct that is either tortious or in violation of plaintiffs' constitutional rights; and (3) principle defendants, and those found by the jury to have acted with malice, are either locally based (such as Rescue America and Don Treshman) or have recently increased their organizational presence in Texas (Operation Rescue-National);

6. Despite existing injunctions imposing place and manner restrictions on defendants' protest activities targeting plaintiff clinics, defendants (or those found by the jury to be acting in concert with them) have continued to engage in protest activity toward some of the clinics using tactics that are harassing to patients and clinic staffs, that are violative of plaintiff clinics' common law and constitutional rights, and that threaten safe, accessible abortions for women seeking medical services at plaintiff clinics.

Appellants also attack the sufficiency of the evidence supporting the trial court's first conclusion of law in B/J point twenty-seven OR point thirty-one. They argue that because the findings are erroneous, the court's conclusion cannot stand because it is without a factual base. Conclusion of Law No. 1 states:

> Absent injunctive relief, defendants are likely to continue to engage in the tortious conduct found by the jury to be in violation of plaintiff clinics and physicians' common law and constitutional rights, and such conduct is likely to cause plaintiff clinics and physicians irreparable harm.

Appellants argue the evidence is insufficient to support the injunction because appellees called only three witnesses to testify at the hearing on the injunctive relief, and these witnesses did not provide testimony relevant to the standard for determining the necessity for and nature of constitutionally permissible injunctive relief. Our review of the record, however, reveals evidence of the conspiracy to interfere with the business, property and privacy rights of appellees, which threatened imminent, irreparable harm.

In addition to the evidence adduced at the hearing on the injunction, ample evidence supporting the injunctive relief was provided at the jury trial. The record contains evidence of appellants' interference with business, privacy and property rights, which is relevant to the harm element necessary for the permanent injunction. Appellees presented evidence that from early 1992 up tc *74 and including the time of trial, appellants engaged in blockades and used aggressive "sidewalk counseling" by yelling, screaming and following patients at the clinics. The jury saw numerous videotapes and photos of blockades at the clinics during the Convention. At times during the Convention there were estimated to be a thousand people outside Planned Parenthood. Judy Reiner, Planned Parenthood's Deputy Director, Dr. Jerry Edwards, an appellee, and Larissa Lindsay, a clinic escort, all testified they saw appellants and those operating at their direction attempting to or successfully impeding or preventing clinic access. Reiner testified that it was obvious the protests were organized and that the large numbers of people were not appearing spontaneously. Reiner testified she saw Keith Tucci, the former national director of Operation Rescue, outside her clinic several times. Reiner testified the protesters were not peaceful, but instead attempted to block patients' access to the clinic. They got within inches of the patients' faces and often touched them. She told how "escorts" had to form a human circle around patients to get through the mobs to the entrance during large protests. She described the patients' and staff's attempts to gain access to the clinics "like running a gauntlet."

Reiner testified Planned Parenthood has had bomb threats, defacement of the building, thrown bottles and rocks, the locks glued shut, and two butyric acid attacks. She described an invasion at Planned Parenthood that occurred in 1989 or 1990 for which Treshman claimed credit. The protesters entered Planned Parenthood and chained their necks to cement blocks. Daniel Scott, a Planned Parenthood employee, testified he fears being shot every time he leaves the building. Jesse Miller, a protester associated with Rescue America, told Scott in March 1994, "This is the day you die, brother." Reiner testified that Planned Parenthood and the other clinics and physicians took seriously the threats made by Tucci and Treshman and those who work under their direction. She testified to the repairs made to the building and measures taken to safeguard the building, staff and patients.

Don Treshman testified about the aggressive

sidewalk counseling promoted by Rescue America and discussed rescues or blockades conducted at the plaintiff clinics. Although Treshman did not participate, his publication, Rescue America's Newsline, advertised a picket at Dr. Kaminsky's house. Treshman invited Rev. Michael Bray, who advocated justifiable homicide of abortionists, to speak at a Rescue America conference in the summer of 1993. Treshman acknowledged that Rescue America will use any methods it deems necessary to save unborn children. The jury saw the videotaped confession of Joshua Graff, admitting he "interfered" with the operation of the West Loop Clinic by trying to blow it up. Treshman admitted that the technique Graff used to firebomb the West Loop Clinic was virtually identical to the one he described in detail on his hotline. Tucci wrote to followers on Operation Rescue letterhead, "if you believe abortion is murder, act like it's murder."

Many of those engaged in protest activities, such as Tom Wieghard and Rusty Thomas, advertised themselves as members of Operation Rescue by wearing its T-shirts. Both told Reiner they acted on behalf of Operation Rescue. Thomas was shown on a video shouting "Murderer" at a protest. John Moloney, described as a Rescue America operative, testified that the common goal of those he worked with was to end abortion by preventing women from going inside the clinics and by preventing physicians from performing abortions. Moloney was seen at clinic protests hundreds of times and also conducted many residential pickets. At these protests, Moloney was seen directing Daniel Ware, who was later arrested on weapons charges for carrying prohibited firearms in his car.

The physicians testified that appellants' actions negatively affected their patients' mental and physical health and made medical procedures more risky. In addition, they testified about the protests at their homes. Dr. Jerry Edwards testified his home had been picketed twelve or fifteen times, the picketing continued after the Republican Convention up to "last weekend." He testified that protesters bring signs, come into hi *7! yard, play loud music, yell and make threats. Photographs were admitted showing the protesters at his residence. He testified he and his young daughter received death threats. He testified he did not feel comfortable at his home and had placed it for sale. He also described protest activities at Planned Parenthood, where he worked as medical director. These activities interfered with his ability to work and caused stress to his patients. Judy Reiner of Planned Parenthood testified she was present at two pickets at the homes of Drs. Edwards and Rosenfeld and saw people associated with Rescue America. She did not see Treshman, Tucci, Benham or Jewitt, however.

Dr. Robert Kaminsky testified his office, Women's Medical Center of Northwest Houston, is picketed regularly. He saw Treshman picket there about five times. He testified James Doyle followed him in his car once. The previous Saturday his business was significantly interfered with by picketers. He testified the activities of protestors pose a health risk to his patients. His house has been picketed about two dozen times. A "Wanted" poster with a photograph of Dr. Kaminsky was used during the picketing. Mrs. Kaminsky testified their home had been picketed about fifteen times, the last time on the previous Saturday. Mrs. Kaminsky also testified she does not feel safe because the protesters follow them to work. Mrs. Kaminsky testified she saw several of Treshman's followers outside both her home and her husband's office several times. She could identify Treshman's followers because she saw them taking direction from him or from John Moloney. She saw John Moloney and James and Estelle Pratt picket their home. She had also seen the Pratts and James Doyle with Treshman in front of their office. A videotape of picketing at the Kaminsky residence was introduced into evidence. On the tape, Moloney shouted at Mrs. Kaminsky, "there is a just punishment that you deserve.... This is just a small taste of what's coming down the pike. We trust we won't have to do it." She described that picket as a "huge shoving match." She testified John Moloney grabbed her, and her teenage daughter was pushed to the ground by activists in her front yard. This incident occurred shortly after Dr. David Gunn was murdered outside an abortion clinic in Pensacola, Florida while a Rescue America-sponsored picket was taking place, and Mrs. Kaminsky testified she feared for her husband's safety. She did not want her husband to come outside during the confrontation with the picketers, but he eventually helped his wife and daughter return to the house. Mrs. Kaminsky testified the event was very scary and upsetting. She described it as "the most terrifying thing I've ever been through." A few days later, Treshman praised Moloney for the Kaminsky picket on his hotline.

Dr. Doug Karpen testified he had seen Treshman at clinic demonstrations and had met him at Hobby Airport, where Treshman and five others followed him. Treshman and Benham admitted monitoring and following Dr. Karpen in a joint effort with Dallas

Rescue for more than six weeks. Dr. Karpen practices at Aaron's Women's Clinic and at Women's Pavilion. He testified protestors had tried numerous time to block access at Aaron's, including an attempted blockade during the Republican Convention and an actual blockade about that time, organized by Operation Rescue and Treshman. There were two attempted blockades at The Women's Pavilion during the Convention. Dr. Karpen's house had been picketed about three to four times, but not within the past two and a half years.

Dr. Bernard Rosenfeld testified demonstrations occur every Saturday at the Houston Women's Clinic where he works. The clinic had been subjected to acts of vandalism, including acid attacks, gluing of door locks, and flooding of his clinic. Many patients had been accosted by protestors and had been "extremely stressed out," making the medical procedures "much more dangerous." Dr. Rosenfeld testified that his house has been picketed about six to eight times and his driveway has been blockaded by protesters. This activity interfered with his ability to work and terrorized his wife and children. The activists told his three and four-year old children, "Your daddy kills babies." Photographs were admitted showing the protesters at his residence.

*76 Dr. Adebayo Adesomo testified Don Treshman of Rescue America was the leader of the protesters at his office at Suburban Women's Clinic during the Republican Convention. Treshman denied he was the leader of that protest, and claimed he only went there to talk to the press. Dr. Adesomo admitted his house had not been picketed. He testified that he was aware that an anti-abortion protester who was an admitted follower of Rescue America had killed a physician working at an abortion clinic, and he feared the same fate could happen to anyone performing abortions.

Dr. Coleman died before trial, and his deposition was not taken. He worked at A-Z Women's Health Services and at the West Loop Clinic. The evidence was that his house had been picketed several times. Treshman admitted he "organized, conducted and announced" a picket at Dr. Coleman's funeral. (FN3)

The evidence from the hearing on the injunctive relief is directed to the issue of irreparable harm and is summarized as follows.

Dr. Morris Taggart, a psychologist, testified about the emotional impact of picketing on patients and staff. He interviewed eight employees of Planned Parenthood. He characterized the reactions of those he interviewed as those of "people having undergone some kind of trauma." The workers reported being physically jostled on arrival at the clinic, and they were yelled at with cries of "baby murderer." The staff was upset and unable to work after these incidents. In Dr. Taggart's opinion, a buffer zone banning "harassing speech" was necessary because of the distress to staff and patients. He testified restrictions are necessary most importantly to prevent physical contact, but also to reduce the proximity of the yelling and screaming. He admitted that on four visits to the Planned Parenthood clinic, he observed only "peaceful protests."

Dr. Dale Hill, also a psychologist, interviewed three patients, three nurses, one doctor and one volunteer in January 1994. In her testimony, she described the encounters with protesters. The patients and staff reported being "hollered at" and "physically transgressed." Some received threats, such as, "You need to die." She concluded protesting was harmful to patients and staff, and a buffer zone is necessary to protect them from psychological and emotional trauma. She observed protests at Planned Parenthood, but never observed any violence at the protests. Her own ingress or egress was not blocked during her three trips to Planned Parenthood.

Laura Lindsay, a Planned Parenthood employee, primarily introduced photographs and diagrams of the clinics setting forth the requested buffer zone areas. She demonstrated through photographs that signs held outside the buffer zones could still be read. She admitted there are numerous differences about the clinics as to the level of traffic, noise, parking, or whether the clinic is in a residential area as opposed to downtown Houston. She acknowledged that, since the 1992 Republican Convention, Planned Parenthood has constructed a wall higher than six feet and a private enclosed drive provides access to the entrance door.

Appellants called Mary Hall Kleypass, a pro-life "sidewalk counselor." She testified she approaches women considering abortion and offers literature about the "development of the baby as well as a place where she could go for help." To be successful, "sidewalk counseling" involves "direct interaction" with the women, using "eye contact." She denied she uses intimidation or grabs anyone, but instead counsels "gently and quietly." She testified that counseling could not be done from across the street because she

would be forced to yell and could not interact with the women. However, on cross-examination Kleypass admitted she is not a party to this case, does not know most of the appellants, does not act in concert with them, and is not subject to the injunction.

[27] The party seeking an injunction must establish the defendant "will engage *" the activity enjoined." *State v. Morale* 869 S.W.2d 941, 946 (Tex.1994). Appellants argue there is no evidence of imminent harm because the spotlight of national politics has moved from Houston and most of the individual defendants have left Houston. They contend that all individuals except Flip Benham, who lives in Dallas, reside out of state. According to appellants, there is no continuing threat of irreparable harm.

We disagree. The evidence at trial shows that appellants Treshman and Rescue America are Houston-based. Appellant Operation Rescue has operatives here. Operation Rescue and its leaders directed and controlled the activities of sympathetic followers in Houston. There was evidence presented at trial that Daniel Ware, Tom Weighard, Rusty Thomas, John Byrd, C.D. Money, Jesse Miller, and other persons in Houston act at the direction or control of appellants in harassing, threatening and interfering with appellees. Tom Wieghard, a member of Operation Rescue, signed Operation Rescue's pledge "to follow the mission's leadership" and engage in its activities "as directed." Weighard admitted his intention was to interfere with Planned Parenthood's business. He admitted he supervised and instructed "anyone who was out there" in front of the clinics, including Joshua Graff, and that he assisted at the blockade of the A-Z Clinic. He testified he had been taught techniques for these activities by coordinators for Operation Rescue-National. Jeff White, director of Operation GOP ("Guard Our Preborn"), the name given the protest activities during the Convention, announced that after the Convention, Operation Rescue "had left behind a thriving pastor-lead rescue community in Houston."

None of the appellants testified that they were willing to stop their activities. Most expressed a clear intention to violate any court order that interfered with their activities. Pat Mahoney of Operation Rescue testified to holding a "Boston Tea Party" where he publicly destroyed a copy of Judge O'Neill's initial TRO and said he would do the same thing again. Flip Benham, national director of Operation Rescue, testified he intended to continue his activities. He testified that Operation Rescue will "live out its gospel in the streets despite injunctions and court orders." Operation Rescue literature makes it clear that "[t]he threats of rescues will hang over the killers' heads every day." Treshman testified Rescue America intends to continue to blockade clinics, "continue to use any effective means we feel will save lives," continue residential picketing, and "continue all activities and all avenues that are effective in stopping the abortion Holocaust." Bob Jewitt wrote to Operation Rescue supporters that "[t]hose of us included in the injunction admitted that we already had an injunction from God to rescue children no matter how the judge would rule." Keith Tucci, former national director of Operation Rescue, wrote, "[n]o matter what the laws say, we are committed to keep rescuing children." He stated in another letter "we will continue our ... direct action...." Reiner testified the protests continued through her testimony at trial.

[28] In making its determination of imminent harm, the trial court may determine that, when violations are shown up to or near the date of trial, the defendant has engaged in a course of conduct and the court may assume that it will continue, absent clear proof to the contrary. *Texas Pet Foods* 591 S.W.2d at 804. The probability of the continuation of the prohibited practices is not subject to direct proof, and injunctive relief is proper when the trial court finds it justified under the rules of equity, notwithstanding a defendant's cessation of the activity or promise to cease the activity. *Id* Here, there was evidence that threats of violence, interference, and invasion of personal and property rights continued up to and during trial. There was no "clear proof to the contrary."

[29] [30] Under Texas law, a violation of a constitutionally guaranteed right inflicts irreparable injury warranting injunctive re *Southwestern Newspapers Corp. v. Curti* 584 S.W.2d 362, 368 (Tex.Civ.App.--Amarillo 1979, no wri *see also Iranian Muslim Organization v. City of San Antonio,* 615 S.W.2d 202, 208 (Tex.1981). In addition, disruption of business constitutes the type of harm for which an injunction may issue *Liberty Mut. Ins. Co.,* 812 S.W.2d at 666 *7 When faced with similar facts, this court found that violation of a clinic lessee's constitutional property rights caused irreparable harm. *Right to Life Advocates, Inc. v. Aaron Women's Clinic,* 737 S.W.2d 564, 571 (Tex.App.--Houston [14th Dist.] 1987, writ denied) *cert. denied* 488 U.S. 824, 109 S.Ct. 71, 102 L.Ed.2d 47 (1988). When the clinic faced a continuation of picketing and harassment by abortion protesters, we determined that a suit for

money damages for loss of business was insufficient, and the only adequate remedy was an injunction limiting the protests. *Id.*

[31] In this case, when the jury inquired whether it had to determine that each appellant personally violated the physicians' privacy and property rights, the court instructed that it could "consider the acts of non-defendants if those persons committed the act, if any, as agents of the listed Defendants. An agent is one who consents to act on behalf of and subject to control of another, the principal, who has manifested consent that the agent shall so act." Appellants make no complaint on appeal as to this instruction. Therefore, we conclude that it is immaterial that each of the individual appellants were not identified as personally engaging in many of the protest activities. It is not essential that each conspirator be shown to have acted in concert with his co-conspirators *See Bourland v. State* 528 S.W.2d 350, 354 (Tex.Civ.App.--Austin 1975, writ ref'd n.r.e.). Once a civil conspiracy is proven, each conspirator is responsible for the acts done by any other conspirator to further the conspiracy *Carroll v. Timmers Chevrolet, In* 592 S.W.2d 922, 926 (Tex.1979).

[32] We find sufficient evidence for the jury to have concluded that the participants in the illegal protests followed the direction of Operation Rescue and Rescue America and their leaders. While appellants denied they organized the protests, many of their denials were impeached by their own writings and deposition testimony. The jury, as the sole judge of the credibility of the witnesses and the weight to be given to their testimony, was free to disregard the testimony of any witness and resolve inconsistencies in the testimony. *McGalliard v. Kuhlman* 722 S.W.2d 694, 697 (Tex.1986); *Skrepnek v. Shearson Lehman Bros., Inc.*, 889 S.W.2d 578, 579 (Tex.App.--Houston [14th Dist.] 1994, no writ).

We conclude that the evidence is sufficient to support the jury's finding that appellants conspired to violate, and did violate, the privacy and property rights of the physicians. In addition, the evidence is factually sufficient to support the trial court's findings in granting the requested injunctive relief both as to the clinics and in favor of the physicians. The contrary evidence is not so overwhelming as to render the court's judgment unjust. Therefore, we also conclude that the trial court's conclusion of law in support of the necessity of the injunction is not erroneous. We overrule OR's points of error eight through thirty-one and B/J's points eight through twenty-seven.

B. Constitutional Complaints

[33] In B/J point one and OR point forty-three, appellants contend the permanent injunction order is void because it violates the right to freedom of speech guaranteed in the First Amendment of the United States Constitution, as construed *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). They also contend the injunction is unconstitutionally overbroad in violation of the First Amendment rights of freedom of speech, press and association in B/J point three and OR point forty-four.

In *Madsen*, the United States Supreme Court set forth the standard for evaluating the constitutionality of a content-neutral injunction such as the one at issue here. We must determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest *Madsen*, 512 U.S. at 765, 114 S.Ct. at 2525. This standard is based on the Court's earlier pronouncement that when sanctionable "conduct occurs in the context of constitutionally protected activity ... 'precision of regulation' is demanded *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982).

*79 [34] In B/J point two and OR point forty-two, appellants also complain the injunction violates the Texas constitution and is not the least restrictive means of protecting the governmental interests involved, in violation of *Ex parte Tucci* 859 S.W.2d 1 (Tex.1993) (plurality opinion). The Texas Constitution's broad command that "[e]very person shall be at liberty to speak ... opinions on any subject" provides greater rights of free expression than the First Amendment of the United States Constitution *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex.1992) (citing TEX. CONST. art. I § 8). For this reason, restraints on expression may be imposed only if the injunctive relief granted encompasses "the least restrictive means" of protecting against the alleged imminent and irreparable harm caused by the expression. *Tucci*, 859 S.W.2d at 6.

The Texas Supreme Court recognized *Tucci* that constitutional protection of freedom of speech and assembly does not license obstruction of public ways or entrances and exits from places of business *Tucci*, 859 S.W.2d at 4. Without unimpaired access to appropriate counseling and medical facilities, women

are deprived of their constitutional guarantee of choice. *Id.*

In *Tucci* the supreme court considered only the portion of the temporary restraining orders on which the contempt convictions were based and which barred:

> Demonstrating within one-hundred (100) feet from either side of or in front of any doorway entrance or exit, parking lot, parking lot entrance or exit, driveway, or driveway entrance or exit at [any of the] clinic[s] or parking lots.

Id. at 4-5. In striking down the 100-foot speech free zone, the supreme court found the limited record before the trial court did not support the ban and noted that although a map of the Planned Parenthood facility was referred to at the hearing on the restraining orders, no evidence was admitted as to the different physical facilities of the various clinics *Id.* at 6. Instead, those seeking the restraint urged a uniform restriction for "administrative convenience." *Id.* The court left open the possibility of a permanent injunction imposing a limited geographical ban on activity as long as any restriction is "justified by a proper evidentiary showing that such measures are essential to preserve the right of clinic access, and that each satisfies fully the standard we have required under the Texas Constitutio *Id.* The court required "specific findings supported by evidence" that the speech-free zone is the least restrictive means to insure unimpeded access to clinics and guard against intimidation and harassment. *Id.*

[35] While we recognize that our supreme court has held that the Texas constitution generally provides greater free speech rights than those provided under the federal constitution, we conclude that the standards of review for the constitutionality of this injunction are essentially the same under both the United States Constitution and the Texas Constitution. Any buffer zone injunction must "burden no more speech than necessary" and be the "least restrictive means" to protect unimpeded access to the clinics and residences.

In *Madse* the United States Supreme Court considered the constitutionality of a state court injunction prohibiting anti-abortion protestors, including Operation Rescue and "Operation Rescue America," from demonstrating outside a health clinic in Florida. Among other restrictions, the injunction prohibited the protestors, from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within 36 feet of the property line of the clinic to ensure access to the clinic *Madsen*, 512 U.S. at 768, 114 S.Ct. at 2526. In upholding this part of the injunction, the Supreme Court recognized that the state court had "few other options to protect access," and the Court gave deference to the state court's familiarity with the facts and the background of the dispute between the parties, even in light of its heightened review. *Id* at 769, 114 S.Ct. at 2527. The Court considered the fact that an earlier, more narrow injunction failed to accomplish its purpose, but stopped short of setting any requirement for a similar failure of a narrow restriction as a prerequisite for injunctions in future cases *I.* The Court concluded that "the 36-foot buffer zone around the clin *8(entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake." *Id.*

[36] The Supreme Court *Madsen* also identified numerous significant government interests protected by the injunction, including: a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy; ensuring public safety and order; promoting the free flow of traffic on public streets and sidewalks; protecting the property rights of citizens; and protecting residential and medical privacy. *Madsen*, 512 U.S. at 767-68, 114 S.Ct. at 2526. The Court found that these governmental interests were sufficient to justify an appropriately tailored injunction to protect them. *Id.*

Here, the same significant governmental interests exist, and almost identical interests are listed in the trial court's conclusions of law. We hold that the governmental interests in this case are sufficiently significant to justify and demand injunctive relief. We now must evaluate the terms of the injunction to determine if they contain the least restrictive means of protection and are tailored to burden no more speech than necessary.

In *Madsen*, the United States Supreme Court upheld a complete buffer zone to protect access to the abortion clinic at issue. The only provision of the clinic buffer zone that the Court struck down was that portion which extended onto the private property of adjoining landowners at the sides of the clinic. (FN4) The zones at issue here do not extend onto private property other than the property on which their clinics or homes are situated. Each of the distance restrictions in the buffer zones in this case are narrower than the 36-foot zone upheld in *Madsen*.

The trial court in this case conducted an evidentiary hearing in addition to the jury trial. Appellants agreed to stipulate to maps, photographs and written descriptions of the proposed buffer zones that were introduced in evidence. Photographic evidence demonstrated that appellants could still be seen outside the prohibited zones. Each zone has been specifically tailored to the geography of the particular clinic. The width and breadth of each zone varies widely depending on the physical characteristics and location of each clinic. The zones range from fifteen to thirty-two feet, depending upon the particular requirements for adequate clinic access.

For example, there was testimony that patients were required to cross two streets from the parking lot to the Planned Parenthood entrance. Narrow corridors were provided across these streets to enable patients to cross the streets without fear of unwanted interference. At the A-Z Women's Clinic, which is located in a high-rise office building, the prohibited zone is fifteen feet from the driveways leading to the clinic's private parking lots, leaving one lane of traffic open for cars to enter and exit. Appellants can still be seen and heard at these locations. The West Loop Clinic has one of the largest buffer zones, thirty-one feet. It is justified due to the physical lay-out of the clinic which fails to provide any separation between appellants and arriving patients. In addition, the West Loop Clinic has been the target of repeated and dangerous acts of protest, including butyric acid attacks and fire-bombing.

We believe that the injunction satisfies the Texas Supreme Court's concern that distances not be imposed based solely upon "administrative convenience." *Tucci*, 859 S.W.2d at 6. We find that the evidence established that these zones are the least restrictive means and are "essential to preserve the right of clinic access" as required by *Tucci*. *See Tucci*, 859 S.W.2d at 7. In addition, we find the injunction satisfies *Madsen*'s requirement for "precision of regulation" to insure that the injunction burdens no more speech than necessary. *Madse*, 512 U.S. at 767, 114 S.Ct. at 2525-26.

[37] Appellants also argue, as part of B/J's points one through three, that the injunction on picketing near the clinics and physicians' residences is overbroad. OR *81 raise essentially the same argument under their point of error forty-four. They contend that the injunction improperly bans *all* speech included within the term "demonstrating" within the buffer zones. This argument is unpersuasive because the United States Supreme Court upheld a complete ban on "demonstrating" within a 36-foot "speech-free" zone in *Madsen*. *Id.* at 768-69, 114 S.Ct. at 2526-27.

[38] Appellants also contend the ban on residential picketing is unconstitutional. The injunction banned all "picketing, patrolling, or demonstrating within ... zone[s] along the entire ... street edge of [each physician's] property extending 13 feet from the property line" into the street where the residence is located.

Appellants maintain that the United States Supreme Court's decision i *Frisby v. Schult* 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) controls the constitutionality of the ban on protests at the physicians' residences. The Court traditionally subjects restrictions on public issue picketing to careful scrutiny. The restrictions must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication. *Id.* at 482, 108 S.Ct. at 2501. Ir *Frisby*, the Court upheld an ordinance banning picketing in residential neighborhoods, finding anti-abortion protestors had ample alternative means to proselytize their views *Id.* at 484, 108 S.Ct. at 2502. The Court construed the ban narrowly as prohibiting focused picketing taking place in front of a particular residence *Id.* at 483, 108 S.Ct. at 2501-02.

[39] [40] The Court also found the restriction served a significant government interest: the protection of residential privacy *I.* A restriction is narrowly tailored if it eliminates no more than the exact source of the "evil" it seeks to remedy. *Id.* at 485, 108 S.Ct. at 2502-03. The Court found that focused picketing inherently and offensively intrudes on residential privacy. *Ia* at 486, 108 S.Ct. at 2503. The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech *Id.* at 487, 108 S.Ct. at 2503-04. The Court concluded that a complete ban on targeted picketing is narrowly tailored to eliminate the "evil" of an unwelcome visitor at the home. *Id.*

[41] The Supreme Court applies a "somewhat more stringent application of First Amendment principles" when evaluating an injunctive order than it does when a content-neutral, generally applicable statute is reviewed, as was the case in *Frisby*. *Madsen*, 512 U.S. at 765, 114 S.Ct. at 2524. Consequently, the injunction must satisfy the review announced in

Madsen, that is, it must burden no more speech than necessary to serve a significant government interest. *Id.* at 765, 114 S.Ct. at 2525.

The injunction i *Madsen* prohibited picketing and demonstrating within 300 feet of the residences of clinic staff. *Id.* at 774, 114 S.Ct. at 2529. In striking down this provision, the Court found a 300-foot zone would ban general marching through the neighborhood or even a walking route in front of an entire block of houses, instead of a prohibition on "focused picketing taking place solely in front of a particular residence" that the Court had approved i *Frisby. Id.* at 775, 114 S.Ct. at 2530. The court recognized that a "limitation on time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.*

The more narrow restriction proposed by the U.S. Supreme Court is precisely what the trial court imposed in this case. This injunction prohibits protests in a small zone in front of each doctor's residence. There are time limits within each 24-hour period and limits on sound amplification within 100 feet of the residences. I *Madsen,* the Supreme Court approved even broader limitations on sound amplification near the residences of clinic staf *Id* at 774, 114 S.Ct. at 2529. Appellants complain that the buffer zone impermissibly prohibits them from passing through the neighborhood. However, the zone is only thirteen feet deep, and protestors have ample access to picket through the neighborhood, so long as they do not "focus" on the area in front of a particular doctor's residence. The thirteen-foot zone is necessary to permit the doctors' families to ha *8 access to their driveways, and it leaves one lane of traffic open for alternate channels of communication by appellants or others.

We hold the injunction on protests at the doctors' residences satisfies the criteria set forth *Frisby* as well as *Madsen,* and is therefore constitutional.

[42] [43] Appellants also contend the trial court made no specific factual findings supporting the injunctive relief. They argue the court instead made mere conclusions that appellants conduct "threatened" the access and use of the clinics. Appellants failed to preserve this complaint for our review. In any cause tried without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. TEX.R. CIV. P. 296. When part of a cause is decided by a jury and part by the court, the party appealing the court-decided issue should request findings of fact and conclusions of l *Heafner & Assocs. v. Koecher,* 851 S.W.2d 309, 313 (Tex.App.--Houston [1st Dist.] 1992, no v *Shenandoah Assocs. v. J & K Properties, I* 741 S.W.2d 470, 484 (Tex.App.--Dallas 1987, writ denied).

[44] [45] [46] [47] The findings in this case satisfy the general requirements for injunctions. Rule 683 governs injunctions, and provides in relevant part:

> Every order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

TEX.R. CIV. P. 683. The requirements of Rule 683 are mandatory and must be strictly followed. *InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.,* 715 S.W.2d 640, 641 (Tex.1986). Findings of fact are not required to challenge the validity of an injunctive order that fails to state a reason for its issuance. *Courtlandt Place Historical Found. v. Doern* 768 S.W.2d 924, 926 (Tex.App.--Houston [1st Dist.] 1989, no writ). While every order granting an injunction must set forth the reasons for its issuance in the order itself, if the enjoined party wishes additional, detailed findings, the party may make a request under the rules of procedure governing findings of fact generally. *Transport Co. v. Robertson Transports, Inc.,* 152 Tex. 551, 261 S.W.2d 549, 553 (1953). Where a party fails to request additional or amended findings after the court files its original findings, the party waives the right to complain on appeal that the findings were not full and complete or that the court failed to enter additional findings of fac *McDuffie v. Blassingame,* 883 S.W.2d 329, 337 (Tex.App.--Amarillo 1994, writ denied).

[48] [49] [50] Here, the trial court's injunctive order adequately stated the specific reasons for its issuance. If additional findings were needed, appellants should have requested them. By failing to request additional findings, appellants have waived any right to complain about omitted or incorrect findings. (FN5 *See Dallas Morning News Co. v. Board of Trustees Dallas ISD,* 861 S.W.2d 532, 538 (Tex.App.--Dallas 1993, writ

denied). Without a request, omitted findings will be presumed in support of the judgment *James Holmes Enters., Inc. v. John Bankston Constr. & Equip. Rental, Inc* 664 S.W.2d 832, 834 (Tex.App.--Beaumont 1983, writ ref'd n.r.e.).

The court recited appellants' specific conduct which justified the injunctive relief. The court found that appellants continued their protest activity despite existing injunctions imposing place and manner restrictions, and concluded that absent injunctive relief, defendants were likely to continue to engage in their tortious conduct. In fact, appellants have brazenly ignored the previous orders of judges in several states. The court determined that narrowly tailored injunctive relief was required to protect several significant governmental interests, which are substanti: *83 the same as those identified *Madsen*. The court detailed the specific, narrowly tailored zone around each clinic's entrance. Each zone was a "[m]eans of protecting unfettered ingress and egress from the clinic, ensuring that [appellants] do not block traffic." *Madsen*, 512 U.S. at 769, 114 S.Ct. at 2526. These zones, by their very descriptions, demonstrate that they are designed to limit no more than the very evil of "in-your-face" harassment shown by the evidence at trial and to permit adequate access to the clinics. We hold that the court's findings are adequate and correct.

In conclusion, we find that the permanent injunction violates neither the federal nor state constitution. B/J points one through three, and OR points forty-two through forty-four are overruled.

Actual Damages

[51] In points of error thirty-two through thirty-six, OR attack the actual damages. They first argue the evidence is insufficient to support causation and foreseeability. They contend that it is not known who committed the acts of vandalism which necessitated repairs to the clinic. In point of error thirty-six, OR argues the damages are excessive. They contend the other costs on which damages were based are associated with increased security measures, and are not properly recompensable as items of damages.

[52] [53] In an action for interference with business relations, a plaintiff may recover "[s]uch damages ... as are a natural and proximate consequence of the interference." *Gonzalez v. Gutierrez*, 694 S.W.2d 384, 390 (Tex.App.--San Antonio 1985, no writ). For civil conspiracy, a Texas plaintiff is entitled to recover all damages that "naturally flow from the civil conspiracy." *Fenslage v. Dawkin* 629 F.2d 1107, 1110 (5th Cir.1980) (citing *Great Nat'l Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex.1964)).

Reiner testified to the following costs of repairs, alterations, and safety measures at Planned Parenthood: (1) construction costs totalling $109,467, which included: $30,812 for a security system; $5,030 for a halon fire suppression system; $42,650 for a more sophisticated sprinkler system; $1,149 for extra fencing; $7,658 for guard services during construction; $3,896 for bullet resistant glass windows; $485 for covering the air conditioning lines; $403 for repairs to the vandalized air conditioning lines; $17,384 for upgrade of the fire alarm system; (2) $33,468 for an additional security guard during the Republican Convention; (3) $21,650 in damages caused by a butyric acid attack; and (4) costs for an escort program totalling approximately $40,000. These sums total $204,585, the amount of actual damages awarded by the jury.

In addition to evidence of appellants' conduct already cited, Reiner testified appellants were responsible for the damages at Planned Parenthood, which required repairs and alterations to the building. By way of example, Reiner testified she heard Treshman describe over his hot line how to conduct a butyric acid attack. Her clinic was then the target of just such an acid attack. Roof and floor tiles were "permeated with a horrible stench" and had to be replaced. She testified that "[b]ecause of the fear of fire bombs, we needed some extra protection." She testified these changes to the building were necessitated solely by appellants' conduct, along with that of their co-conspirators and agents. She stated that "these four defendants [against whom damages were awarded] clearly have conspired to initiate additional costs through their very actions and deeds and their own statements." This testimony was uncontradicted.

Planned Parenthood sought reimbursement for out-of-pocket expenses it incurred as a result of appellants' illegal protest activity. The evidence previously recited demonstrates that appellants acted intentionally to shut down the clinics and to keep patients away. It was foreseeable that Planned Parenthood would be forced to respond to the threats and acts of vandalism with appropriate security measures. Appellants cite to no evidence in the record that Planned Parenthood's expenses were excessive or unnecessary. Judy Reiner testified these changes were essential to continued

clinic operation. We conclude that the evidence in the record is factually sufficient to support the actu ***84** damages awarded by the jury. We overrule OR's points of error thirty-two through thirty-six.

Punitive Damages

[54] In points of error thirty-seven and thirty-nine, OR assert the punitive damages awarded are erroneous because the jury did not award specific actual damages caused by appellants' conduct in maliciously engaging in a conspiracy to interfere with Planned Parenthood's business. OR argue that a reasonable proportionality between actual and punitive damages cannot be shown as required by the Texas Supreme Court.

Actual damages were based on affirmative answers to either Question No. 6, in which the jury found appellants wrongfully interfered with the ability of the clinics to provide medical services, or Question No. 3 on proximate cause of damages from the conspiracy. In answer to Question No. 1, on which Question No. 3 was predicated, the jury found appellants engaged in a conspiracy to interfere with the clinics' business. Question No. 4, which asked whether OR acted with malice, was limited to malice as to the conspiracy.

Appellants correctly cite the general rule there must be a finding of actual damages in tort to uphold an award of punitive dan *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex.1986). Here, the jury awarded actual damages in tort, but awarded punitive damages based only on conspiracy.

OR did not object to the charge on the basis that the damages could result from the conspiracy or wrongful interference with the clinics. It raised no objection to Questions Nos. 7-10, the damages questions, which were predicated on an affirmative answer either a conspiracy finding or a finding of wrongful interference. Therefore, OR has waived any error in this regard *Cosgrove v. Grime* 774 S.W.2d 662, 665-66 (Tex.1989) (holding the defendant waived error by failing to object to defective damages submission); TEX.R. CIV. P. 274. We overrule points of error thirty-seven and thirty-nine.

[55] [56] [57] In point thirty-eight OR contest the factual sufficiency of the evidence supporting punitive damages. In considering the propriety of an award of punitive damages, we must apply the review enunciated in *Transportation Ins. Co. v. Moria* 879 S.W.2d 10, 30 (Tex.1994). The Texas Supreme Court requires that when we conduct a factual sufficiency review of a punitive damages award, we must detail the relevant evidence in our opinion as to why the evidence supports or does not support the punitive damages in light of the factors i *Alamo Nat. Bank v. Krau* 616 S.W.2d 908, 910 (Tex.1981). *Id.* at 31. These factors are: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which such conduct offends a public sense of justice and propriety. *Kraus*, 616 S.W.2d at 910. Exemplary damages must be reasonably proportioned to actual dama *Id.* The Supreme Court acknowledged i *Kraus*, however, that there is no set ratio between actual and punitive damages. *Id.*

The amount of actual damages awarded was $204,585 and the total amount of punitive damages were $1,010,000. Similar ratios are routinely approved by courts of this state. It is significant that the amounts found against the individual defendants were substantially less than those against the organizations. It is also significant that the jury awarded $5,000 additional punitive damages, over and above the amount originally requested, against Rescue America, and its leader Don Treshman, for whom there was abundant evidence of involvement in organizing the protests and encouraging acts of vandalism. The evidence already discussed shows that the organizers acted intentionally and with malice. They were unconcerned about the consequences so long as their goal of stopping abortion was achieved. The evidence of appellants' conduct in this case, such as firebombing, acid attacks, and death threats, is so egregious as to be highly offensive and repugnant to law abiding citizens.

We conclude that the evidence supporting the jury's award of punitive damages is factually ***85** sufficient. OR's point of error thirty-eight is overruled.

[58] In point of error forty, OR challenge the award of punitive damages because two of the jurors voting for punitive damages did not join in the verdict on actual damages. Only ten of the twelve jurors voted to award actual damages.

Rule 292 provides that the same ten members of an original jury of twelve may render a verdict. TEX.R. CIV. P. 292; *Palmer Well Servs., Inc. v. Mack Trucks, Inc.*, 776 S.W.2d 575, 576 (Tex.1989). There is a

split of authority as to whether the same ten jurors who found liability in the first phase of the trial must agree upon the amount of punitive damages in the second phase of a bifurcated trial. The Corpus Christi Court of Appeals determined that they did not, finding Rule 292 does not apply *Greater Houston Transportation Co. v. Zrubeck,* 850 S.W.2d 579, 588 (Tex.App.--Corpus Christi 1993, writ denied). Recently, the Amarillo Court of Appeals reached the opposite conclusion. *See Hyman Farm Serv., Inc. v. Earth Oil & Gas, Inc.* 920 S.W.2d 452 (Tex.App.--Amarillo 1996, no writ). In *Hyman,* the court rejected what it called "dicta" in *Zrubeck,* and held that Rule 292 requires the same ten or more jurors to concur in all answers necessary to a judgment, including the answer to the amount of punitive damages awarded, if any, in a bifurcated trial. *Id.* at 457-58.

[59] We need not decide whether Rule 292 applies because appellants made no objection before the verdict to the two dissenting jurors' participation in the punitive damages deliberations. In fact, appellants demanded the two jurors' participation. Thus, they have waived any complaint. TEX.R.APP. P. 52(a). Moreover, the punitive damages verdict was unanimous. Therefore, the same ten jurors that voted to award actual damages found punitives. In the event it was error for the other two jurors to join in the verdict, it is clearly harmless. We overrule point of error forty.

[60] In point of error forty-one, OR challenge Planned Parenthood's amendment of its damages request after the jury verdict but before rendition of judgment. The jury awarded $5,000 additional punitive damages, above the amount requested, against Treshman and Rescue America. Planned Parenthood requested a pre-judgment trial amendment, which the court granted. The trial court then incorporated the amended amounts in its judgment. OR contend the amendment operated to their surprise and prejudice, and that it was violative of Rule 47.

[61] [62] Rule 47 requires a pleading setting forth a claim for relief to give fair notice of the claim involved and to state that the damages sought are within the jurisdictional limits of the court. TEX.R. CIV. P. 47. A pleading is sufficient when it gives fair and adequate notice of the facts upon which the pleader basis its claim. *Roark v. ,* 633 S.W.2d 804, 810 (Tex.1982). The purpose of Rule 47 is to give the opposing party information sufficient to enable him to prepare a defense. *Id.*

[63] The trial court has no discretion to deny a trial amendment unless appellan *demonstrat* surprise. *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.,* 844 S.W.2d 664, 665 (Tex.199' *Greenhalgh v. Service Lloyds Ins.* , 787 S.W.2d 938, 939 (Tex.1990); TEX.R. CIV. P. 63 (requiring leave to amend to be granted absent a showing of surprise); TEX.R. CIV. P. 66 (requiring the court to freely allow amendment in absence of showing of prejudice). Appellants failed to show they were surprised by the amendment. We hold the trial court did not abuse its discretion in permitting the pre-judgment amendment to appellees' pleadings. OR point of error forty-one is overruled.

Errors in the Judgment

[64] [65] OR complain in point of error forty-eight, and B/J complain in point thirty-one, that the trial court erred in failing to include "take-nothing" provisions in favor of appellants against some of the plaintiffs. The jury did not find that appellants violated the rights of Dr. Richard Cunningham, Dr. Howard Novick, or two businesses adjoining Planned Parenthood, Brian G. Martinez, D.D.S., and O'Connor & Co., d/b/a Adkins Architectural Antiques. The court recited i ***86** the judgment, however, the jury's answers to each question as to each plaintiff and intervenor. Appellants cite no authority that the trial court's failure to include "take-nothing" provisions is reversible error. Unsupported points of error are waive(*See Trenholm v. Ratcliff,* 646 S.W.2d 927, 934 (Tex.1983). We overrule OR point of error forty-eight and B/J point of error thirty-one.

[66] In OR's points forty-nine and fifty and B/J's points thirty-two and thirty-three, appellants argue that the trial court erroneously amended its judgment. Appellees requested the court to correct two matters they deemed "clerical errors." The two changes were: (1) to correct the parenthetical numerical in the award of punitive damages to $355,000 to coincide with the wording; and (2) to change the enforcement paragraph in the injunction by adding "any officer, agent, servant, employee, attorney, or person acting in active concert with defendant, who has actual notice of the order." OR assert that this second change is not a clerical error. OR concede that the transferee court had plenary jurisdiction over the judgment by virtue of appellants' timely filed motion for new trial, but argue the court could not correct a "judicial error" in the enforcement paragraph of the judgment.

[67] "Clerical errors" are mistakes or omissions that prevent the judgment as entered from reflecting the judgment as rendered. The trial court may correct clerical mistakes even if it has lost plenary jurisdiction. *Andrews v. Koch* 702 S.W.2d 584, 585 (Tex.1986); TEX.R. CIV. P. 316, 329b(h).

First, we note that the injunctive order section of the judgment provides that: "defendants, their officers, directors, agents, representatives, employees, attorneys, and all persons acting in concert with or participating with, by or through them are enjoined and restrained from the following:...." Thus, we find that addition of the same language to the enforcement paragraph was necessary and proper to correct a clerical error. In addition, we note that Rule 683 contemplates the injunctive order being binding upon "parties, their officers, agents, servants, employes, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order." *See* TEX.R. CIV. P. 683. Therefore, the correction to comply with the terms of the rule was properly made. We find no error in the correction in the amended judgment of this clerical error and overrule OR's points forty-nine and fifty and B/J's points thirty-two and thirty-three.

[68] In OR point of error fifty-one and B/J point thirty-four, they argue the trial court had no authority to enter the judgment nunc pro tunc to correct the amended judgment. Appellants' motion for new trial was overruled on February 10, 1995. The trial court entered a judgment nunc pro tunc on June 15, 1995 to include attachment of exhibits describing the buffer zones. These exhibits were referred to in the original judgment, and were attached to that judgment. When the judgment was first amended, the exhibits were inadvertently omitted. Failure to attach the exhibits to the judgment is a clerical error, not a judicial error. Therefore, the trial court could properly enter a judgment nunc pro tunc after expiration of it plenary power. TEX.R. CIV. P. 316, 329b(h). We overrule OR point of error fifty-one and B/J point of error thirty-four.

Costs

Appellants complain about the trial court's allocation of costs in OR's points of error fifty-two through fifty-four and B/J points thirty-five through thirty-seven. On May 23, 1995, the court ordered the district clerk to issue a new cost bill reflecting "previously taxed costs" of $15,057.75 and adding "retaxed additional costs" of $15,087.82.

[69] [70] The successful party shall recover costs from its adversary. TEX.R. CIV. P. 131. A "successful party" is one who obtains a judgment of a competent court vindicating a civil claim of right. *Perez v. Baker Pack* 694 S.W.2d 138, 143 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Allocation of costs is a matter for the trial court's discretion and cannot be overturned absent a showing of abuse. *Hill v. Robinson* 592 S.W.2d 376, 378 (Tex.Civ.App.--Tyler 1979, writ ref'd n.r.e.); *Coleman v. Donahe* 55[illegible] *8 S.W.2d 860, 864 (Tex.Civ.App.--Houston [14th Dist.] 1977, writ dism'd).

[71] [72] A court may not adjudge costs other than as provided by Rule 131 unless good cause is shown. *Dover Elevator Co. v. Servellon,* 876 S.W.2d 166, 169 (Tex.App.--Dallas 1993, no wr *Contemporary Health Management, Inc. v. Palaci* 832 S.W.2d 743, 745 (Tex.App.--Houston [14th Dist.] 1992, no writ); TEX.R. CIV. P. 141. In the absence of an explanation for assessing costs contrary to the rule, the trial court abuses its discretion. *See Guerra v. Perez & Assoc.,* 885 S.W.2d 531, 533-34 (Tex.App.--El Paso 1994, no writ); *Dover Elevator Co. v. Servellon* 812 S.W.2d 366, 367 (Tex.App.--Dallas 1991, no writ).

[73] A motion to adjudge costs involves an assessment by the court as to who shall pay the costs, while a motion to retax costs involves the question of the amount of costs assesse *Reaugh v. McCollum Exploration Co.,* 140 Tex. 322, 167 S.W.2d 727, 728 (1943); *City of Ingleside v. Stewart* 554 S.W.2d 939, 948 (Tex.Civ.App.--Corpus Christi 1977, writ ref'd n.r.e.). A motion to retax costs is one to correct the ministerial act of the clerk of the court in tabulating costs. *Wood v. Wood,* 159 Tex. 350, 320 S.W.2d 807, 813 (1959).

[74] In OR point fifty-two and B/J point thirty-five, appellants complain that the court failed to reduce the costs awarded against them by a proportionate amount for the two plaintiffs against whom all defendants were successful and the eight plaintiffs against whom one of the defendants was successful. We are cited to no authority requiring the trial court to make this proportionate reduction in costs. Moreover, rather than retaxing of costs, this proportionate reduction is an allocation or adjudication of costs, which was required to be made within the trial court's plenary power. Where the complaint is made of the ruling of a court in

adjudging costs against the wrong party, the error is inherent in the judgment and must be properly assigned, just as any other alleged error *Reaugh*, 167 S.W.2d at 728.

[75] [76] In OR point fifty-three and B/J point thirty-six, appellants argue the court was without jurisdiction to retax costs because more that thirty days had elapsed since appellants' motion for new trial was overruled. Because taxing of costs, as distinguished from the adjudication of costs, is merely a ministerial duty of the clerk, an error may be corrected upon the injured party's motion, even after the case has been disposed of on appeal, as long as the request is made before the mandate issues and the costs are *Hartzell Propeller, Inc. v. Alexande* 517 S.W.2d 455, 456 (Tex.Civ.App.--Texarkana 1974, no writ). We find the trial court had authority to retax costs.

[77] In OR point fifty-four and B/J point thirty-seven, appellants contend the retaxed costs are in error.

The Civil Practice and Remedies Code Provides in relevant part:

> A judge of any court may include in any order or judgment all costs, including the following:
> (1) fees of the clerk and service fees due the county;
> (2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
> (3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
> (4) such other costs and fees as may be permitted by these rules and state statutes.

TEX. CIV. PRAC. & REM.CODE § ANN. 31.007(b) (Vernon Supp.1996).

Appellants complain about being assessed the costs for the following: (1) $6,030.53 for citing by publication 10,000 John and Jane Doe defendants who were later nonsuited; (2) $5,308.80 and $1,245 for the transcript of the hearing on the temporary injunction; (3) $859.40 for transcripts of four depositions taken by defendants; (4) $2,355 for rental of a television and video recorder; (5) $120 for copies of videotapes (6) $416 and $118.77 for photos of the clinics and residences; (7) $3,627.50 for service of citation on eight defendants by private process servers; and (8) $382.35 for service of subpoenas.

***88** [78] [79] All of these costs were necessary to the conduct of the trial. Most of these expenditures, such as rental of the television and video recorder, were specifically ordered by the trial court. The trial court also ordered appellees to provide appellants with copies of the videotapes they intended to show at trial. It was also the trial court who ordered the unknown Doe defendants to be served because they would be bound by the injunction as appellants' agents. The affidavit from Neal Manne, appellees' counsel, substantiates that the trial court ordered these expenses and that they were reasonably and necessarily incurred in the prosecution of the suit. In addition, the affidavit from Judy Reiner states that the fees were reasonable and necessary to prosecute the suit. Deposition expenses are properly chargeable as court costs. *Wallace v. Briggs* 162 Tex. 485, 348 S.W.2d 523, 527 (1961); *Shenandoah Assocs. v. J & K Properties, Inc.*, 741 S.W.2d 470, 487 (Tex.App.--Dallas 1987, writ denied). Subpoena and citation fees are recoverable as court costs *Shenandoah* 741 S.W.2d at 487. The affidavits attached to appellees' motion support a determination by the trial court that the transcript from the temporary injunction hearing was "necessarily obtained for use at trial," in accordance with TEX. CIV. PRAC. & REM.CODE § ANN. 31.007(b)(2).

Attached to the trial court's order retaxing costs are the original itemization from the district clerk and an amended itemization with numerous items deleted from the original list. According to appellees' motion, the redacted items were for costs incurred by plaintiffs other than appellees. From this itemization, it appears that appellees have not been awarded costs for plaintiffs that did not recover. The court's order also reflects that a hearing was conducted on appellees' motion to retax costs. We have no record of the hearing, and in the absence of a record, we cannot determine the basis for the court's order. It is appellants' burden to furnish a sufficient record to demonstrate error. TEX.R.APP. P. 50(d).

We find no abuse of discretion in permitting appellees, the prevailing parties, to recover their costs. We overrule OR's points of error fifty-two through fifty-four and B/J's points of error thirty-five through thirty-seven.

We affirm the judgment of the trial court.

AMIDEI, Justice, dissenting.

I respectfully dissent from the court's majority opinion.

The portion of the judgment awarding a permanent injunction is void and should be reversed and rendered for one or more of the reasons as follows:

1. The trial court did not make a finding there was a threat of imminent harm. The trial court must make such finding to support a permanent injunction. *Frey v. DeCordova Bend Estat* 632 S.W.2d 877, 881 (Tex.App.--Fort Worth 1982) *affirmed* 647 S.W.2d 246 (Tex.1983) *Isuani v. Manske-Sheffi* 805 S.W.2d 602, 605 (Tex.App.--Beaumont 1991, writ denied); *Green v. Unauthorized Practice of Law Committee,* 883 S.W.2d 293 (Tex.App.--Dallas 1994, no writ) (a prevailing, successful petitioner for injunctive relief must demonstrate the following grounds: (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate and realistically complete re *Univ. Interscholastic League v. Buchanan,* 848 S.W.2d 298, 301 (Tex.App.--Austin 1993, no v *Hues v. Warren Petroleum* (814 S.W.2d 526, 529 (Tex.App.--Houston [14th Dist] 1991, writ denied).

The trial court merely made the following conclusion of law:

> "1. Absent injunctive relief, defendants a *likel* to continue to engage in the tortious conduct found by the jury to be in violation of Plaintiff clinics and physicians' common law and constitutional rights, and such conduct i *likel* to cause plaintiff clinics and physician *irreparable* harm." (Emphasis added)

There is no language in such conclusion which directly stated or implied there was at the time of trial a threat of imminent harm. The Republican National Convention had long since been over as well as the picketing activities the subject of this action. There ***89** was no threat of imminent harm, and the trial court found none. For this reason alone the injunctive portion of the judgment should be held void and reversed and rendered in favor of the appellants.

The question regarding "imminent harm" cannot be deemed because the appellants submitted jury question and instruction no. 4 to the court asking whether the appellees were subject to imminent harm. The court refused such question and instruction.

2. There was no irreparable harm notwithstanding the finding in the above stated conclusion no. 1. Injunctive relief is not proper when an adequate remedy at law, i.e. a claim for damages, was availat *Ia* at 530; *Mitchison v. Houston I.* 803 S.W.2d 769 (Tex.App.--Houston [14th Dist] 1991, writ denied) (a party demonstrates irreparable harm when he shows that an award of damages a month later will not provide adequate compensation). To state it is likely there will be harm in the future is not to say it is an imminent threat. Further, the appellees recovered a jury verdict in the amount of $1,214,585 not including personal injuries against the appellants. If this type award is not adequate, then it was the will of the jury, which could have made it more. I believe the award is more than adequate under the circumstances. If there are any damages in the future, which is unlikely, another jury will be available to make the appellees whole. Damages awarded by the jury far exceeded any out of pocket expenses of the appellees.

3. The trial court failed to state reasons for its issuance pursuant to Rule 683 Texas Rules of Civil Procedure. Rule 683 requires the court *i every* order granting an injunction to set forth the reason for its issuance. Further, the reasons shall be specific in terms and shall describe in reasonable detail and not by reference to the complaint or document, the act or acts sought to be restrained. Rule 683 Texas Rules of Civil Procedure.

The trial court made the following findings:

1. Defendants' conduct threatens access to plaintiff clinics by women seeking abortion and other medical services; [in Point of Error 25]

2. Defendants' conduct threatens the use and enjoyment of plaintiff clinics' and physicians' property rights; [in Point of Error 26]

3. Defendants' aggressive and harassing manner of protesting and sidewalk counseling of clinic patients increases the risk attendant to the abortion procedure; [in Point of Error 27]

4. Defendants' targeted picketing of plaintiff physicians' homes threatens and interferes with plaintiff physicians' right of privacy [;] [in Point of Error 28]

5. Defendants have not abandoned their activities toward plaintiffs, but (1) remain committed to their

particular protest tactics and would use them again toward plaintiffs if the circumstances (such as a national media event in Houston) presented itself; (2) have aided and abetted others in continuing to engage in conduct that is either tortious or in violation of plaintiffs' constitutional rights; and (3) principle (sic) defendants, and those found by the jury to have acted with malice, are either locally based (such as Rescue America and Don Treshman) or have recently increased their organizational presence in Texas (Operation Rescue--National[;] [in Point of Error 29])

6. Despite existing injunctions imposing place and manner restrictions on defendants' protect activities targeting plaintiff clinics, defendants (or those found by the jury to be acting in concert with them) have continued to engage in protest activity toward some of the clinics using tactics that are harassing to patients and clinic staffs, that is violative of clinics' common law and constitutional rights, and that threatens safe, accessible abortions for women seeking medical services at plaintiff clinics. [in Point of Error 30]

These findings are conclusions and do not state the act or acts sought to be restrained. They do not state facts which they could even be tested. This is important because the court was stating reasons to enjoin twenty *91 eight different parties. The differing operative facts as to all such parties, including where located, militate against the sweep treatment the court displayed for permanent injunction purposes. The Court failed to state what conduct the appellants were protesting or what they did.

The trial court must state these reasons without any request of the parties. The Court was not required to make findings of fact and conclusions of law as this was a jury case. Rule 296 Texas Rules Civil Procedure specifically provides that findings may be requested in any case tried "without an jury." Therefore, the reasons for injunction could not be waived for not asking for findings of fact and conclusions of law as suggested by the majority.

4. The Permanent Injunction is unconstitutionally overbroad. The Permanent Injunction portion of the judgment provides in Section E that appellants are prohibited from "demonstrating" within described zones that circumvent nine facilities belonging to appellees. "Demonstrating" was defined as "oral or other expression that publicly displays, manifests, or expresses one's feelings or opinions ... and expressly includes 'sidewalk counseling.' " These zones also extend from the edges of the properties into any adjoining public streets, approximately to the center line of the respective streets adjoining each of the facilities. The zones are shown on plats of each facility attached as exhibits to the judgment. The Planned Parenthood facility also has two protected corridors, fifteen feet wide, extending from two parking lots across the public streets to the facility. The widest zone is thirty-two feet (Women's Medical Center of N.W. Houston) and the narrowest zone is fifteen feet (AAA Concerned Women's Center). Similarly, Section I of the judgment provides restrictions pertaining to the five physician appellees prohibiting "congregating, picketing, patrolling, or demonstrating" within thirteen foot zones extending from their respective property lines into the adjoining streets.

The record does not show any evidence that "such measures are essential to preserve the right of clinic access, and that each satisfies fully the standard we have required under the Texas Constitution" as required b *Ex Parte Tu* 859 S.W.2d 1, 7 (Tex.1993). *Tucc.* held: "Unless such a restriction is proved to be the least restrictive means of guarding against an irreparable and imminent injury, it is an impermissible infringement on our state constitutional right of free expression." *Id.*

In *Tucci* Rev. Keith Tucci, and six other abortion protestors, had been held in contempt for violating a temporary restraining order previously entered in these proceedings. The parties, four of whom are appellants in this appeal, brought original habeas corpus proceeding in the Texas Supreme Court asserting they had been confined for expression which is protected under article I, section 8 of the Texas Constitution (freedom of expression). The temporary restraining order, in part, barred demonstrating within one hundred (100) feet of any of the nine clinics, appellees in this appeal. The relators i *Tucci* did not attack any of the other provisions of the restraining orders but challenged only the one-hundred foot limitation as unconstitutional. The confinement of relators was premised solely on their having disregarded portions of the one-hundred foot limitation. The other provisions of the restraining orders were clearly directed to protecting against the specific injuries alleged by the women, clinics and businesses and access by injunctive relief that barred:

> [t]respassing on, physically invading, entering without consent, damaging, sitting in, blocking, impeding or obstructing access to, ingress into or

egress from any part of the Planned Parenthood (FN1) facility ..., including the entrances and exits, the parking lots ..., and any of the clinic's or parking lots' entrances and driveways.

Additionally, the temporary restraining orders contained four independent provisions to guard against intimidation and harassment that prohibited:

Demonstrating within twenty-five (25) feet of any person seeking access to or leaving the clinic, its parking lots, or intervenors' businesses or parking lots, or in any w *9 impeding such person's entrance to or exit from the clinic, parking lots or businesses;

Physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, or crowding persons entering or leaving, working at, or using any services at Planned Parenthood's above-referenced facility or at the intervenors' businesses;

Harassing, intimidating or physically abusing any doctor, health care professional, or other staff member, employee or volunteer who assists in the provision of services at the ... facility; and

Making any sound or noise (whether by mechanical loudspeaker, sound amplification device or otherwise) that is so loud that it disturbs, injures, or endangers the health or safety of any patient or staff person of the ... facility.

In this case, in an effort to comply v *Tucci,* the trial court conducted an evidentiary hearing on the issues of injunctive relief. The plats of the proposed limited geographical ban were introduced into evidence and attached as exhibits to the judgment. However, there was no evidence introduced at this hearing or during the jury trial that these geographical bans were the least restrictive means available to ensure unimpeded access to clinics and guard against intimidation and harassment. *Tucci* mandates that such restrictions *mus.* be justified by a proper evidentiary showing that such measures a *essentia* to preserve the rights of clinic access and that such restrictions are the least intrusive as to individual liberties *Tucci,* 859 S.W.2d at 7.

The judgment contains provisions clearly directed to protecting against the specific injuries alleged by the women and clinics. Injunctive relief bars:

A. Entering without consent upon or damaging any part of the premises, facilities and parking lots of [the nine clinics].

B. Blocking or attempting to block, barricade, or in any other manner obstruct the entrances to, or the premises of [the nine clinics].

C. Inhibiting, impeding, obstructing or interfering with, or attempting to inhibit, impede, or obstruct or interfere with the free and unmolested ingress and egress of persons (either pedestrian or vehicular) to and from the facilities and parking lots and the streets and sidewalks adjacent to the facilities and parking lots of [the nine clinics].

D. Touching, physically abusing, intimidating, or harassing any individual attempting to enter or exit the facilities or parking lots of [the nine clinics].

Section E, as written in the judgment, concerning "demonstrating" violates Article I, Section 8 of the Texas Constitution, as set out in this opinion. However, the above restrictions A through D would be the least restrictive means to protect against the intimidation and harassment complained of. Sections A through D are the least restrictive means that are essential to preserve the right of clinic access or if there is evidence to prove that demonstration-free zones would be the least restrictive means to protect a woman's right to have an abortion as set out ir *Tucci* at 7.

For the same reasons, the restrictions in Sections F through H, that pertain to the residences of the physicians specifically provide for injunctive relief that would protect the physicians against the conduct complained of. These restrictions are:

F. Trespassing on, sitting in, blocking or impeding plaintiff physicians, their family members and their guests or invitees from access to, ingress into or egress from any part of plaintiff physicians' residences.

G. Inhibiting, impeding or attempting to impede or inhibit the free ingress or egress of any person to the streets that provide access to the streets on which the plaintiff physicians' residences are located;

H. Harassing, threatening, assaulting, or physically abusing plaintiff physicians, their family members, guests or invitees.

However, Section I of the judgment providing for the 13 foot zone is likewise void unde *Tucci* as there was no evidence introduced at the trial or at the hearing on the ***92.** injunction that would prove that such a zone would be the least restrictive means to prevent the harm complained of. The United States Supreme Court has approved prior restraints against free speech. *Frisby v. Schultz* 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). *Frisby* abortion protestors brought suit seeking to enjoin the enforcement of a municipal ordinance prohibiting picketing before or about the residence or dwelling of any individual. The Court found that the ordinance did not ban all picketing in residential areas, but only prohibited focused picketing taking place solely in front of particular residences. The ordinance served a significant government interest of protecting residential privacy. An important aspect of such privacy is the protection of unwilling listeners within their homes from the intrusion of objectionable or unwanted speech. The ordinance is "narrowly tailored" to serve that governmental interest, since it targets and eliminates no more than the exact source of "evil" it seeks to remedy: offensive and disturbing picketing focused on a "captive" home audience. It does not prohibit more generally directed means of public communication that may not be completely ban *I* 487 U.S. at 487-89, 108 S.Ct. at 2504. Although injunctive relief is available to prevent picketing, similar to the picketing in *Frisby, Tuc* mandates an evidentiary hearing to prove that a buffer zone, such as is the case here, is the least restrictive means of preventing this harm. Section I could read: "Congregating, picketing, patrolling, or demonstrating in front of the [physician's] residence" if the court finds this is the least restrictive means of preventing the harm. *Id; see also Ex Parte Pierce,* 161 Tex. 524, 342 S.W.2d 424, 427 (1961) (Constitutional protection of the right to free speech and free assembly does not license interference with and obstruction of public ways or entrances to and exists from places of business by picketing).

Further, I would reverse and remand the damages portion (including punitive) of the judgment for the following reasons:

The appellants' complaint that the trial court refused to include in the charge a complete definition of the essential elements of an actionable civil conspiracy as requested has merit. Omitted over objection were the essential elements: (1) one or more overt acts, and (2) damages resulting from the conspira *Massey v. Armco Steel Compa* 652 S.W.2d 932, 934 (Tex.1983); *Metzger v. S* 892 S.W.2d 20 (Tex.App.--Houston [1st Dist] 1994, writ denied). The essential elements are:

> The plaintiff in a civil conspiracy action must show the following elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate resul *Masse* 652 S.W.2d at 934; *Bernstein v. Portland Sav. and Loan A* 850 S.W.2d 694, 705 (Tex.App.--Corpus Christi 1993, writ denied) The "unlawful, overt acts" must be acts in furtherance of the conspi *Masse* 652 S.W.2d at 934.

In *Massey* the court held plaintiffs had not alleged a cause of action for conspiracy because of failure to allege an unlawful overt act. Harmful error resulted from such omission because the definition of conspiracy was the basis of appellees' causes of action. The first two questions to establish liability on the appellants and questions 3 through 9 establishing damages use the term "conspiracy." It is obvious it was harmful to appellants because a $1,214,585 judgment was rendered against them. This judgment does not include damages for personal injuries, and seems excessive for what was involved. The jury could very well have decided the case differently had the omitted elements been included by the trial judge. The error, in light of the entire record, was reasonably calculated to and probably did cause the rendition of an improper judgment. *Reinhart v. Youn* 906 S.W.2d 471, 473 (Tex.1995).

FN* The Honorable Ross A. Sears sitting by assignment.

FN1. Appellants have not raised any points of error attacking the sufficiency of the evidence supporting the jury's findings that they participated in a conspiracy to interfere with the business of the clinics or that they and their operatives tortiously interfered with the clinic's business. By failing to allege error in a point of error, any complaint as to these findings has been waive *San Jacinto River Authority v. Duke,* 783 S.W.2d 209, 210 (Tex.1990).

FN2. We note that in addition to violations of civil law, as well as local and state criminal laws appellants may have violated, their actions would now also be violative of federal law. In 1994, the federal government passed the Freedom of Access to Clinic

Entrances Act. 18 U.S.C § 248 (West 1996) (applicable to conduct occurring on or after May 26, 1994). This Act was prompted by the violence at abortion clinics all over the United States, and it is aimed directly at these appellants and their other conspirators who blockade abortion clinics or threaten employees or patients. The Act makes it a crime to interfere "by force or threat of foi *or by physical obstruction* " with anyone who is seeking or performing an abortion or other reproductive health service. 18 U.S.C.A. § 248(a)(1) (emphasis added).

FN3. Even though appellants allege four points of error challenging the sufficiency of the evidence supporting the jury's finding that appellants violated Dr. John Coleman's rights, the finding is immaterial because Dr. Coleman was awarded no damages and obtained no injunctive relief.

FN4. The Court also struck down other prohibitions in the injunction, apart from the buffer zone, that are not at issue here.

FN5. Appellants objected to the trial court's findings in their motion for new trial. The record does not contain a request for additional findings, however, and the motion for new trial cannot be construed as a timely request. *See* TEX.R. CIV. P. 298.

FN1. Near identical provisions were included in the order applicable to the other clinics.

cite as:

 Operation Rescue-Nat'l v Planned Parenthood of Houston & Southeast Tex., Inc., 937 S.W. 2d 60 (1996).

Court:	Tex.App. Houston 14th Di
Judges:	Sears, Majority
	Amidei, Dissenting

Underpinnings: Click here to view authorities cited by 937,SW2d,60

citations:

Published for April 1998 - June 1998

<Houston App. 14th Dist>

1998 Tex. App. LEXIS 1567 Parker v Lancon

Published prior to April 1998

writ granted

*157 940 S.W.2d 157

Earl and Gail NEWSOME, individually and as Sole Heirs of Jill Newsome, Appellants,
v.
CHARTER BANK COLONIAL, Formerly known as Colonial National Bank; Dr. Gerald W. Johnson; Houston Northwest Plastic Surgery Associates, P.A.; Houston Northwest Outpatient Surgery Center, Inc., Appellees.

No. 14-95-00455-CV.
Court of Appeals of Texas,
Houston (14th Dist.).
Dec. 12, 1996.
Rehearing Overruled March 27, 1997.

Garnishors sued garnishee-bank for conversion, fraudulent transfer, and conspiracy, based on bank's failure to impound funds in certain accounts held in names of judgment debtors and third parties. The 133rd District Court, Harris County, Lamar McCorkle, J., entered judgment for bank. Garnishors appealed. The Court of Appeals, Murphy, C.J., held that: (1) bank did not convert funds; (2) bank did not accept fraudulent transfers; (3) bank did not conspire with judgment debtors to fraudulently transfer funds; and (4) trial court abused its discretion in assessing costs against bank.

Affirmed, as modified.

1. TROVER AND CONVERSION ⚿4
   389 ----
   389I Acts Constituting Conversion and Liability Therefor
   389k4 Assertion of ownership or control in general.
Tex.App.-Houston [14 Dist.] 1996.
"Conversion" consists of wrongful exercise of dominion or control over another's property in denial of, or inconsistent with, the other's rights.

See publication Words and Phrases for other judicial constructions and definitions.

2. TROVER AND CONVERSION ⚿2
   389 ----
   389I Acts Constituting Conversion and Liability Therefor
   389k2 Property subject of conversion.
Tex.App.-Houston [14 Dist.] 1996.
Money is subject to conversion only when it can be identified as specific chattel, and not when indebtedness may be discharged by payment of money generally.

3. TROVER AND CONVERSION ⚿2
   389 ----
   389I Acts Constituting Conversion and Liability Therefor
   389k2 Property subject of conversion.
Tex.App.-Houston [14 Dist.] 1996.
Action for conversion of money will lie where money is delivered for safe keeping, intended to be kept segregated, substantially in form in which it is received or an intact fund, and not subject of title claim by its keeper.

4. BANKS AND BANKING ⚿100
   52 ----
   52III Functions and Dealings
   52III(A) Banking Franchises and Powers, and Their Exercise in General
   52k100 Torts.
Tex.App.-Houston [14 Dist.] 1996.
Only those funds that were captured by writ of garnishment served on bank could be specific chattel subject to garnishors' claim of conversion against bank.

5. COURTS ⚿100(1)
   106 ----
   106II Establishment, Organization, and Procedure
   106II(H) Effect of Reversal or Overruling
   106k100 In General
   106k100(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Supreme court decision that effects change in law generally applies retroactively.

6. GARNISHMENT ⚿110
   189 ----
   189V Lien of Garnishment and Liability of Garnishee
   189k110 Grounds and extent of liability of garnishee in general.
Tex.App.-Houston [14 Dist.] 1996.
Bank served with writ of garnishment was only required to impound funds held by named judgment debtors, and was not required to impound funds held in accounts of third-parties not named as judgment debtors.

7. GARNISHMENT ⚿110
   189 ----

189V Lien of Garnishment and Liability of Garnishee
189k110 Grounds and extent of liability of garnishee in general.
Tex.App.-Houston [14 Dist.] 1996.
Bank served with writ of garnishment was only required to impound those funds held in accounts of named judgment debtors on date of service of writ and any additional funds deposited in those accounts by due date of its answer; thus, bank was not required to impound funds deposited by judgment debtors during pendency of garnishment proceeding.

8. JUDGMENT ⚿199(1)
228 ----
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(1) In general.

[See headnote text below]

8. JUDGMENT ⚿199(3.10)
228 ----
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(3.10) Where there is no evidence to sustain verdict.
Tex.App.-Houston [14 Dist.] 1996.
Jury finding must be disregarded when there is no evidence to support it or it is immaterial.

9. JUDGMENT ⚿199(1)
228 ----
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k199 Notwithstanding Verdict
228k199(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Jury question is "immaterial," requiring court to disregard it, when it should not have been submitted or when properly submitted, it is rendered immaterial by other findings.

See publication Words and Phrases for other judicial constructions and definitions.

10.FRAUDULENT CONVEYANCES ⚿24(1)
186 ----
186I Transfers and Transactions Invalid
186I(B) Nature and Form of Transfer
186k24 Transactions Subject to Attack by Creditors
186k24(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Garnishee-bank did not exercise dominion or control over judgment debtors' funds that were not captured by writ of garnishment, and, therefore, was not "transferee" capable of accepting fraudulent transfers. V.T.C.A., Bus. & C. §§ 24.01-24.13.

See publication Words and Phrases for other judicial constructions and definitions.

11.GARNISHMENT ⚿110
189 ----
189V Lien of Garnishment and Liability of Garnishee
189k110 Grounds and extent of liability of garnishee in general.
Tex.App.-Houston [14 Dist.] 1996.
As to accounts not captured by writ of garnishment, garnishee-bank's duty was simply to pay funds as directed by its depositors and in accordance with applicable law and prudent banking standards.

12.APPEAL AND ERROR ⚿1003(5)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(5) Great or overwhelming weight or preponderance.
Tex.App.-Houston [14 Dist.] 1996.
Garnishors, who bore burden of proof as to garnishee-bank's alleged conspiracy to fraudulently transfer debtors' funds, properly raised great weight challenge to jury verdict favoring bank.

13.APPEAL AND ERROR ⚿1003(5)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(5) Great or overwhelming weight or preponderance.
Tex.App.-Houston [14 Dist.] 1996.
In reviewing great weight challenge to jury verdict, reviewing court must examine entire record to determine if there is only slight evidence to support

finding, if finding is so against great weight and preponderance of evidence as to be clearly wrong and manifestly unjust, or if great preponderance of evidence supports its nonexistence.

14.APPEAL AND ERROR ⚖1003(5)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(5) Great or overwhelming weight or preponderance.
Tex.App.-Houston [14 Dist.] 1996.
Reviewing court ***157** may reverse and remand jury verdict only if it concludes that complained of finding or nonfinding is against great weight and preponderance of evidence.

15.CONSPIRACY ⚖19
91 ----
91I Civil Liability
91I(B) Actions
91k19 Evidence.
Tex.App.-Houston [14 Dist.] 1996.
Jury finding that garnishee-bank did not participate in judgment debtor's alleged conspiracy to defraud garnishors was supported by evidence that neither debtor, nor any of his family members, employees, or business associates talked to bank employees or officers about hiding assets from garnishors, as well as expert testimony that conspirator would not use other accounts at same institution where he was conspiring to withhold funds or put accounts in name of family members and that bank had complied with banking industry standards in its dealings with debtor.

16.FRAUDULENT CONVEYANCES ⚖310
186 ----
186III Remedies of Creditors and Purchasers
186III(M) Trial
186k310 Verdict and findings.
Tex.App.-Houston [14 Dist.] 1996.
Trial court's refusal to award to garnishors the amount of funds jury found to have been fraudulently transferred by judgment debtors to garnishee-bank, was effectively a disregard of those jury answers as immaterial.

17.COSTS ⚖32(1)
102 ----
102I Nature, Grounds, and Extent of Right in General
102k32 Prevailing or Successful Party in General
102k32(1) In general.

[See headnote text below]

17.COSTS ⚖208
102 ----
102IX Taxation
102k208 Duties and proceedings of taxing officer.
Tex.App.-Houston [14 Dist.] 1996.
Successful party to suit may recover costs from adverse party, unless trial court finds good cause to adjudge costs otherwise and states its reasons on record. Vernon's Ann.Texas Rules Civ.Proc., Rules 131, 141.

18.APPEAL AND ERROR ⚖984(1)
30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) In general.
Tex.App.-Houston [14 Dist.] 1996.
Proper standard for reviewing trial court's good cause to adjudge costs so as not to allow successful party to recover costs from adversary is to determine whether trial court clearly abused its discretion. Vernon's Ann.Texas Rules Civ.Proc., Rules 131, 141.

19.GARNISHMENT ⚖191
189 ----
189VI Proceedings to Support or Enforce
189k191 Costs and attorney's fees.
Tex.App.-Houston [14 Dist.] 1996.
Garnishee-bank was "successful party" in garnishors' suit for conversion, fraudulent transfer, and conspiracy, for purposes of assessing costs, notwithstanding fact that garnishors recovered under writ of garnishment, as jury's verdict and court's judgment vindicated bank's right to make transactions which garnishors contended violated statutory duties or duties in tort. Vernon's Ann.Texas Rules Civ.Proc., Rule 131.

See publication Words and Phrases for other judicial constructions and definitions.

20.GARNISHMENT ⚖191
189 ----
189VI Proceedings to Support or Enforce
189k191 Costs and attorney's fees.
Tex.App.-Houston [14 Dist.] 1996.
Trial court abused its discretion in assessing costs against garnishee-bank that was successful party in garnishors' suit for conversion, fraudulent transfer, and

conspiracy without stating reasons for assessing costs contrary to usual rule. Vernon's Ann.Texas Rules Civ.Proc., Rules 131, 141.

***159** Bobbie G. Bayless, Houston, for appellants.

Ben Taylor, Dallas, William J. Boyce, Lynne M. Gomez, Houston, for appellees.

Before MURPHY, C.J., and ANDERSON and O'NEILL, JJ.

OPINION

MURPHY, Chief Justice.

This is a suit for damages arising out of a garnishment action. Earl and Gail Newsome ("the Newsomes") appeal from a judgment in favor of Charter Bank Colonial, Formerly Known as Colonial National Bank ("the Bank"). The Newsomes sued the Bank for conversion, fraudulent transfer, and conspiracy alleging that the Bank violated a writ of garnishment by failing to impound funds in certain accounts held in the names of the judgment debtors and third-parties. A jury rendered a verdict in favor of the Bank on all but one of the claims. After disregarding the jury's finding with respect to that claim, the trial court entered judgment for the Bank. The trial court's judgment does, however, award the Newsomes certain funds which were covered by the writ of garnishment and deposited in the registry of the court. On appeal, the Newsomes raise four points of error primarily attacking the sufficiency of the evidence. The Bank raises a cross-point contending that the trial court's judgment is erroneous insofar as it taxes all costs against the Bank and purports to deny the Bank's motion to disregard jury findings. The Bank also raises five other cross-points conditioned on whether this court sustains any of the Newsomes' points of error. We affirm as modified herein.

I. FACTS

Many of the following procedural facts are stipulated. In February 1982, the Newsomes, on behalf of their daughter, obtained an $11.3 million medical malpractice judgment in the 133rd District Court of Harris County, cause no. 79-42525, against Dr. Gilbert W. Johnson, Houston Northwest Plastic Surgery Associates, P.A. and Houston Northwest Outpatient Surgery Center, Inc. (collectively "the medical malpractice defendants" or "the judgment debtors"). (FN1) In Apri ***160** 1982, the Newsomes filed an application for writ of garnishment in the same court in cause no. 79-42525-A and served the writ of garnishment on the Bank. The writ identified only the medical practice defendants as the judgment debtors. Within the time required by law, the Bank answered that on the date of service and the due date of its answer, it was indebted to the judgment debtors in the total amount of $40.00. The Bank also answered that it did not know of any other parties who were indebted to, or who held "effects" belonging to, the judgment debtors. On May 21, 1982, Dr. Johnson filed for bankruptcy. As a result, the garnishment action was stayed until December 17, 1985, when the bankruptcy court entered its order denying Dr. Johnson's request for a discharge from his debts.

In April 1986, four months after the dismissal of the bankruptcy case, the trial court granted the Newsomes' request for turnover relief and appointed a temporary receiver for Dr. Johnson's medical practice, other business enterprises, and non-exempt assets. At the same time, the Newsomes filed another suit designated as cause no. 79-42525-H. In that suit, the Newsomes requested that certain conveyances made by Dr. Johnson and his wife be set aside and sought a judicial declaration that the medical malpractice judgment was a community debt. The Newsomes also sought injunctive relief to prevent the Bank and numerous other defendants from transferring assets to the judgment debtors. The court issued a temporary restraining order enjoining the defendants from releasing any assets that were held in the name of Dr. Johnson or his wife or over which they had signature authority. On June 4, 1986, the Newsomes settled what is referred to as "the injunction suit" with Dr. Johnson and his wife. The settlement agreement in part required Dr. Johnson to pay some of the Newsomes' outstanding medical bills and to make certain monthly payments on the Newsome judgment. In return, the Newsomes agreed to abate the turnover proceedings and to dismiss the injunction suit. Dr. Johnson also agreed to dismiss his malicious prosecution suit against the Newsomes' attorney. The settlement agreement, however, did not affect the garnishment action. On June 13, 1986, the court dismissed the injunction suit.

On January 10, 1987, Dr. Johnson's bankruptcy case was dismissed. In April 1987, almost five years after service of the writ of garnishment, the Newsomes began filing affidavits and pleadings in the garnishment action alleging that the Bank failed to fully disclose that it was indebted to third-parties related to the judgment debtors. In that regard, the Newsomes claimed that the

Bank knew or should have known that Dr. Johnson was attempting to avoid garnishment by depositing income from his medical practice in accounts held in the name of his wife, other family members or employees, and that the Bank should have taken action to impound, or prevent the transfer of, these funds. (FN2) The Bank filed affidavits and pleadings denying these allegations and asserting that these third-parties were never named as judgment debtors in the writ of garnishment and that none of the judgment debtors were signatories to accounts held by these parties. The Bank also asserted that these accounts did not even exist until several years after the Bank was required to answer the writ.

On July 12, 1990, the Bank filed an interpleader action depositing $1,088.37 into the registry of the court. This amount includes additional indebtedness to one of the named judgment debtors at the time of service of the writ in the amount of $1048.37, which was uncovered by the Bank during discovery. In late 1994, after denying motions for summary judgment filed by both parties, the trial court called the case to trial. A jury found in favor of the Bank on all but one of the claims submitted. Both parties filed motions to disregard the jury's findings. In its judgment and modified judgment, the court recites that it denied the Bank's motion and granted the Newsomes' motion in part. However, witho *161 explanation, the trial court awarded the Newsomes only the $1,088.37 deposited in the registry of the court, plus court costs. After the court overruled their motion for new trial, the Newsomes perfected this appeal.

II. CONVERSION

In point of error one, the Newsomes challenge the legal and factual sufficiency of the evidence to support the jury's answer to question 7 relating to their conversion claim. The Newsomes contend the Bank's liability for conversion is established as a matter of law because the Bank violated the writ of garnishment by failing to impound funds held in accounts in the name of third parties, but which allegedly belonged to Dr. Johnson. They assert the Bank owed a duty to impound the funds in these accounts from the time Bank was served with the writ until further order of the court. The Bank contends that its duty to impound funds was limited merely to those funds held in accounts of the named judgment debtors on the date of service as well as any additional funds deposited in those accounts by the due date of its answer. Because it is uncontroverted that the Bank deposited those funds into the registry of the court, the Bank asserts it complied with the writ of garnishment and did not commit conversion as a matter of law. The Bank raised these issues in objections to the charge.

A. Specific Chattel

[1] [2] [3] [4] Conversion consists of the wrongful exercise of dominion or control over another's property in denial of, or inconsistent with, the other's rights. *Estate of Townes v. Town* 867 S.W.2d 414, 419 (Tex.App.--Houston [14th Dist.] 1993, writ denied). Money is subject to conversion only when it can be identified as a specific chattel, and not where an indebtedness may be discharged by the payment of money generally *Id.* An action for conversion of money will lie where the money is (1) delivered for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by its keeper. *Id.* Here, the Bank contends the only funds that could be a specific chattel and subject to a claim of conversion were those captured by the writ of garnishment served on the Bank. The Bank is correct. The only question is what funds were captured by that writ of garnishment. That question can be answered by determining the Bank's duty as garnishee under the writ.

B. The Garnishee's Duty

1. Whose Funds Are Garnished?

In *Bank One, Texas, N.A. v. Sunbelt Savings, F.S.B.*, 824 S.W.2d 557, 558 (Tex.1992), the supreme court held that a bank served with a writ of garnishment may rely solely on its deposit agreement when determining the party to whom it is indebted. There, the judgment creditor obtained a writ of garnishment against a bank naming James C. Bramlett as the judgment debtor. 824 S.W.2d at 557-58. The writ did not, however, name Bramlett's corporation which had accounts at the bank. *Id.* Bramlett did not have accounts at the bank, but commingled his personal funds with the corporate funds in the corporate accoun *Id.* at 558. As a result, the bank correctly answered the writ of garnishment stating that it was not indebted to Bramlett. *Id.* After Bramlett subsequently withdrew funds from the corporate accounts, the judgment creditor sought to hold the bank responsible for failing to impound funds held in the name of Bramlett's corporation. *Id.* Ruling in favor of the bank, the court stated:

> Funds placed with a bank ordinarily become general deposits which create a debtor-creditor relationship

between the bank and its depositor. (citation omitted) A garnishee bank is not indebted to a judgment debtor unless some form of deposit agreement creates a debtor-creditor relationship between the bank and the judgment debtor.

When a creditor wants to challenge title to funds held by a third party, the creditor should seek a writ of garnishment naming the nominal owner not the true owner. The court is then responsible for determining true ownership. Requiring a garnishee bank to determine true ownership of ***16** deposits improperly shifts a judicial responsibility to the garnishee.

Id.

[5] The Newsomes point out that the writ of garnishment was served, and the Bank's answers were filed, long before the supreme court's opinion i *Bank One*. Assumin; *Bank On* effected a change in the law, the court's decision applies retroactiv *See Bowen v. Aetna Casualty and Surety Co.* 837 S.W.2d 99, 100 (Tex.1992) (per curiam) (a decision of the supreme court operates retroactively unless the court exercises its discretion to modify that application). However, it is not entirely clear that *Bank One* changed the law. Citin *Thompson v. Fulton Bag & Cotton Mills*, 155 Tex. 365, 286 S.W.2d 411, 414 (1956), the Newsomes assert that the law i *Bank One* required the garnishee to impound funds held in the names of third parties where the ownership of such funds was contested. As explained i *Bank One* the existing law did not impose such a requirement:

> In [*Thompson*], we held that '[t]he scope of the inquiry in a writ of garnishment is broad enough to impound funds of the debtor, held by the garnishee, even though title thereto stands nominally in a third party.' [citation omitted] However, we were only addressing the scope of the jurisdiction of the court issuing the writ of garnishment when a garnishee chooses to pay into the court funds to which the third party holds nominal title. *Thompson* did not hold that the garnishee is required to pay into the court funds to which title is in a third party who is not named in the writ of garnishment. This is true even when there is a question of true ownership. (FN3)
>
> *Bank One*, 824 S.W.2d at 558. (emphasis added)

[6] Thus, it appears from the opinion th *Bank One* did not overrule existing law, but merely clarified it. *See id.* Although the Newsomes filed several controverting affidavits contesting the ownership of certain accounts, the Newsomes never applied to the court for, and never served, a writ of garnishment naming the third-parties whose names appeared on those accounts. *See Bank One*, 824 S.W.2d at 557-58; *see als Overton Bank And Trust v. PaineWebber, Inc.*, 922 S.W.2d 311, 313-14 (Tex.App.--Fort Worth 1996, no writ). It was the court's responsibility, not that of the Bank's, to determine the true ownership of the accounts in question *Se Bank One*, 824 S.W.2d at 557-58. Generally, a writ is "a judicial order to perform a specified act, or giving authority to have it done...." BLACK'S LAW DICTIONARY 1608 (6th ed.1990). Only a writ of garnishment ordering the Bank to account for its indebtedness to the third-parties in question would have compelled the Bank to impound the funds in such third-party accounts. The fact that Mrs. Johnson was identified in the application for the writ of garnishment is immaterial *See Overton Bank*, 922 S.W.2d at 313-14.

Because the Newsomes never served a writ of garnishment naming Mrs. Johnson or any other third-party as a judgment debtor, the Bank's failure to impound funds held in accounts by such parties did not violate the writ of garnishmen *Se Bank One*, 824 S.W.2d at 558. Furthermore, the Bank's obligation to impound funds under the writ extended only to those funds held by named judgment debtors on the date of service of the writ, plus any additional funds held by the named judgment debtors on the due date of the Bank's answer.

2. What Funds Are Garnished?

[7] The writ of garnishment served on the Bank in this case followed the form suggested in Texas Rule of Civil Procedure 661. According to the Newsomes, that rule required the Bank to impound any funds deposited by the judgment debtors during the pendency of the garnishment proceeding. The Bank contends it was obligated to impounc ***163** only those funds held in the accounts of the named judgment debtors on the date of service of the writ and any additional funds deposited in those accounts by the due date of its answer. The Bank relies *Consolidated Gasoline Co. v. Jarecki Mfg. Co* 72 S.W.2d 351 (Tex.App.--Eastland 1934) *opin. adopte* 129 Tex. 644, 105 S.W.2d 663 (1937).

In that case, the garnishee answered the writ some seven months after its answer was due. In the answer, the garnishee stated the amount it was indebted to the judgment debtor on the date of service and the due date

of the answer. 72 S.W.2d at 351. The judgment creditor objected to the answer in part because it did not show additional indebtedness accruing up to the time the garnishee actually filed its answe *Id* After first recognizing that garnishment is purely a statutory remedy, the requirements of which must be "strictly pursued," the court observed that former article 4081 defined the duty imposed on the garnishee *Id.* at 352; *see* TEX.REV.CIV. STAT. ANN. art. 4081 (repealed 1939). Under that statute, according to the court, "the effect of the due service of a legal writ is to impound whatever indebtedness the garnishee owes the defendant at the time of the service of the writ, and also whatever additional indebtedness, if any, so owing at the time the garnishee is required by the writ to appear and answer." *Id.*

In holding that the garnishee was indebted to the defendant in the amount shown at the time of the due date of its answer, the court concluded that "the policy of the law to impound existing debts, rather than future accruing debts," which was reflected in the existing garnishment statutes and case law, was left unchanged by certain statutory amendments. The court recognized that the "whole duty of the garnishee is to answer upon the day commanded in the writ what, if anything, he is *then* indebted to the defendant and was when the writ served." *Id* at 352-53 (emphasis in original). The court stated "that it is the writ of garnishment which measures the duty of the garnishee and the right of the plaintiff, and results in the impounding of the indebtedness and *only such as the garnishee owes the defendant at the time the writ was s*" *Id.* (emphasis added). The supreme court adopted the opinion of the court of appeals, concluding "that the questions presented were correctly decided by that court and that the reasons given for its holding are correct." 105 S.W.2d at 663.

The holding in *Jarecki* is perfectly consistent with the Rules of Civil Procedure relating to garnishment. Specifically, the form of writ suggested in Rule 661, like former article 4081 discu *Jarecki,* specifically commands the garnishee "to answer upon oath what if anything, you are indebted to the said [defendant], and were *when this writ was serve* upon you...." *Se* TEX.R. CIV. P. 661 (emphasis added); *see also* TEX.R. CIV. P. 668. The Newsomes ignore this language in the rule. Instead, they rely on cases that cite the following language of the rule:

> You are further commanded NOT to pay to defendant any debt or to deliver to him any effects pending further order of this court.
>
> TEX.R. CIV. P. 661 (Vernon Supp.1996). (FN4)

Neither this quoted language nor the cases cited by the Newsomes, are pertinent to the issue decided in *Jarecki;* that is, what funds are actually captured by a writ of garnishment. Rather, that language and those cases deal with the garnishee's duty once funds are captured by the wri *Se Texas Commerce Bank v. Townsend,* 786 S.W.2d 53, 55 (Tex.App.--Austin 1990, writ denied) (holding that garnishee bank not liable for wrongful dishonor by failing to pay check presented by debtor on his trust account after service of writ but before answer date); *Industrial Indem. Co. v. Texas Am. Ban* 784 S.W.2d 114 (Tex.App.--Fort Worth 1990, no writ) (holding that garnishee's appeal of prior judgment in favor of judgment debtor did not constitute unliquidated debt so as to preclude a judgment in favor of garnishor pursuant to writ of garnishment); *Collier Mfg. & Supp *16 Inc. v. Interfirst Bank Austin,* 749 S.W.2d 560 (Tex.App.--Austin 1988, no writ) (holding that garnishee bank violated equitable obligation to garnishor by paying garnished funds to debtor after writ of garnishment was erroneously dissolved); *Glassman & Glassman v. Somoz* 694 S.W.2d 174 (Tex.App.--Houston [14th Dist.] 1985, no writ) (holding that garnishor failed to show that writ of garnishment issued on garnishee bank was erroneously dissolved); *Intercontinental Terminals, Co. v. Hollywood Marine, Inc.,* 630 S.W.2d 861 (Tex.App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.) (holding that fact issue existed as to amount of garnishee's indebtedness to debtor at time of service of writ of garnishment); *Cohen v. Advance Imports, In* 597 S.W.2d 449 (Tex.App.--Dallas 1980, writ ref'd n.r.e.) (holding that garnishee was not liable for conversion in suit brought by debtor after garnishee refused to return debtor's merchandise following dissolution of only one of two writs of garnishn *Westridge Villa Apartments v. Lakewood Bank & Trust* 438 S.W.2d 891 (Tex.App.--Fort Worth 1969, writ ref'd n.r.e.) (holding that garnishee who transferred garnished funds to intervenor during pendency of garnishment proceeding failed to establish defense to judgment favoring garnishor based on stipulations entered of record).

Clearly, none of these cases were decided on facts or issues similar to those disputed in this case. These cases do not overrule, limit, distinguish or even refer to *Jarecki* nor do they cite the pertinent language of the rule. Thus *Jareck* is still the law concerning what funds may be captured by a writ of garnishmer *See*

Matter of Boha. 743 F.2d 313, 324 n. 9 (5th Cir.1984) (noting that garnishment traps the indebtedness owed when the writ was served as well as that owed when the garnishee answers). *Baytown State Bank v. Nimmons* 904 S.W.2d 902, 906 (Tex.App.--Houston [1st Dist.] 1995, writ denied) (stating that service of the writ of garnishment creates a lien on the judgment debtor's property, impounding the funds in the hands of the garnishee bank) *Rome Indus., Inc. v. Intsel Southwest* 683 S.W.2d 777, 779 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding that a writ of garnishment not only impounds the funds held by garnishee when the writ is served, but also funds belonging to the debtor up to and including the day the garnishee is required to file its answer).

Accordingly, the only funds that were a specific chattel in this case were those held in the accounts of the named judgment debtors on the date of service of the writ as well as any additional funds deposited in those accounts by the due date of the Bank's answer. Because the Bank deposited those funds into the registry of the court, we hold that the Bank fully complied with the writ of garnishment and is not liable for conversion. Point of error one is overruled.

III. FRAUDULENT TRANSFER

In points of error two and three, the Newsomes contend the trial court erred in failing to render judgment against the Bank for the transfer of funds by the judgment debtors to the Bank before and after September 1, 1987. Effective on that date, the Legislature replaced Chapter 24 of the Texas Business & Commerce Code with the Uniform Fraudulent Transfer Act ("the Act" *Se* Act of September 1, 1987, 70th Leg., R.S., ch. 1004 § 2 1987 Tex. Gen. Laws 3393, 3394 (current version at TEX. BUS. & COM.CODE ANN. §§ 24.01-24.13 (Vernon 1987 & Supp.1996)). The Act contains new and different provisions than former Chapter 24. Because the transfers alleged to be fraudulent occurred both before and after the change, the trial court submitted the Newsomes' claim in two jury questions: one asking about transfers under former Chapter 24 and another asking about transfers under the new Act.

In answer to questions 1 and 2, the jury found the judgment debtors fraudulently transferred $1,577,052.00 to the Bank before September 1, 1987. In answer to questions 3 and 5, the jury found the judgment debtors fraudulently transferred $5,141,018.60 to the Bank after September 1, 1987. Because neither amount is included in the judgment, the trial court apparently disregarded these jury findings. However, the court's reasons for doing so are not entirely clear from the ***165** record. (FN5)

[8] [9] [10] A jury finding must be disregarded when there is no evidence to support it or it is immaterial. *Spencer v. Eagle Star Ins. Co* 876 S.W.2d 154, 157 (Tex.1994). A question is immaterial when it should not have been submitted or when properly submitted, it is rendered immaterial by other findings. *Id.* The Bank raises several arguments in support of the trial court's ruling. In particular, the Bank argues that the trial court properly disregarded the jury's findings regarding fraudulent transfers because the Bank was not a "transferee." As a result, the Bank argues there was no "transfer." The Bank raised this issue in its objections to the charge.

Neither the former nor current fraudulent transfer statutes define a "transferee." However, the Fifth Circuit, in addressing the issue of avoidable transfers under the Bankruptcy Code, has defined a transferee as a party who has legal dominion or control over the funds; that is, the right to put the money to one's own use. *Matter of Cou* 984 F.2d 138, 141 (5th Cir.1993) (citing *Bonded Financial Services, Inc. v. European Am. Bc* 838 F.2d 890, 893 (7th Cir.1988)). A party does not have dominion over the funds until it is "in essence, 'free to invest the whole [amount] in lottery tickets or uranium stocks,' if it wishes." *Coutee* 984 F.2d at 141 (quoti *Bonded,* 838 F.2d at 894). Similar to the fraudulent transfer statutes in Texas, the Bankruptcy Code allows the bankruptcy trustee to avoid certain transfers. Specifically, section 547 of the Bankruptcy Code provides that a trustee may avoid a transfer made by a debtor to an existing creditor within ninety days before bankruptcy if the transfer enables the creditor to receive more than a designated share of the debtor's estate. *Se Coutee,* 984 F.2d at 14 *see als* 11 U.S.C. § 550. Section 550(a)(1) provides that the bankruptcy trustee may recover a preference avoided under section 547 from the "initial transferee of such transfer." *Se id.* Botl *Coutee* and *Bondea* involve questions of "initial transferee" status under the Code.

In *Coutee,* a plaintiff's law firm arranged a loan for particular clients and acted as guarantor on the clients' note with the banl *Ia* at 139. When the clients recovered a judgment, they endorsed the check to the firm, which deposited the funds into its trust account. *Id.* at 140. After taking its legal fees out of the funds, the firm paid off the loan to the bank and gave the remainder to the client *Ia* Within ninety days of

payment of the note, the clients filed for bankruptcy and the trustee filed an action against the bank seeking to avoid payment of the note on grounds that it was a preference under section 547. *Id.* The bank argued the firm, not the bank, was the initial transfere *Id* The court disagreed, finding that the bank was the initial transferee of the loan proceeds. (FN6 *Id.* The court held that by depositing the funds from the judgment in its trust account for the benefit of its clients, the firm did not exercise dominion and control over those funds, and thus, was not an initial transferee under section 550(a)(1). *I* at 141. The court noted that an intermediary party that does not gain actual dominion and control over funds is "a mere conduit or agent." *Id.* at n. 3.

In *Bonded* Ryan controlled a number of currency exchange businesses and owned a horse farm. 838 F.2d at 891. Ryan borrowed $200,000 from the bank to run the horse far *Ic* One of Ryan's currency exchanges sent the bank a check payable to the bank's order with a note directing the bank to "deposit this check into [Ryan]'s ***166** account." *Id.* After the bank complied, Ryan instructed the bank to debit his account by $200,000 to reduce the outstanding balance on the loan to the horse farm *Id.* Ryan subsequently paid the loan in full and the bank released its security interest in the horses. *Id.* Less than a month after it sent the check to the bank, the currency exchange filed for bankruptcy. *Id.* The bankruptcy trustee then sought to avoid the initial $200,000 transfer from the currency exchange to the bank *Id* Finding that the bank was merely a financial intermediary and received no benefit from the transaction, the court held the bank was not an initial transferee, but was bound to follow the instructions that came with the check, i.e, to pay Ryan. *Id.* at 893. In reaching this conclusion, the court stated:

> The potential costs of monitoring and residual risk are evident when the transferees include banks and other financial intermediaries. The check-clearing system processes more than 100 million instruments every day; most pass through several banks as part of the collection process; each bank may be an owner of the instrument or agent for purposes of collecting at a given moment. Some of these funds represent funds fraudulently conveyed out of bankrupts, yet the cost of checking back on the earlier transferors would be staggering.
>
> * * * * * *
>
> Exposing financial intermediaries and couriers to the risk of disgorging a fraudulent conveyance in such circumstances would lead them to take precautions, the cost of which would fall on solvent customers without significantly increasing the protection of customers.
>
> *Id.*

[11] Here, the Bank fulfilled its duty to impound those funds held in accounts captured by the writ of garnishment. *See Jarecki,* 72 S.W.2d at 352-53. As to all other accounts not captured by the writ of garnishment, the Bank's duty was simply to pay funds as directed by its depositors and in accordance with applicable law and prudent banking standar *See Mesquite State Bank v. Professional Inv. Cor,* 488 S.W.2d 73, 75 (Tex.1973 *Upper Valley Aviation, Inc. v. Mercantile Nat'l Ban* 656 S.W.2d 952, 955 (Tex.App.--Dallas 1983, writ ref'd n.r.e.). The Newsomes contend the Bank should have impounded the funds in some of these other accounts because it allegedly knew or should have known at the time that the funds actually belonged to Dr. Johnson. However, the Bank did not exercise "dominion or control" over these funds. *See Coutee,* 984 F.2d at 141 *see also Bonded,* 838 F.2d at 893.

While there is evidence that the Bank engaged in a number of imprudent transactions with Dr. Johnson, many involving third-party checks cashed with improper endorsements for large dollar amounts or on other bank accounts, the Bank did not own these funds or otherwise benefit from these transactions, but was simply complying with its depositors' instructions to pay Dr. Johnson. As such, the Bank was merely a "financial conduit or intermediary" in the collection process. *See Coutee,* 984 F.2d at 141, n. 3 *see also Bonded,* 838 F.2d at 893. Therefore, any knowledge the Bank might have had at the time of the various transactions about the source of funds in other accounts, an issue hotly contested at trial, would not have bestowed the Bank with dominion or control over such funds. As we stated, the Newsomes contested the ownership of these accounts by filing controverting affidavits, not by applying for another writ of garnishment. *Se* TEX.R. CIV. P. 658, 673. Dr. Johnson was not a signatory to any of the third-party accounts in question. In the absence of another writ of garnishment capturing such accounts, the Bank was simply not obligated to determine the ownership of the accounts in question or to impound the funds held in these accounts. *See Bank One,* 824 S.W.2d at 558.

Because we hold that the Bank was not a transferee,

there was no transfer giving rise to liability on the part of the Bank under the former or current fraudulent transfer statutes. Therefore, the fraudulent transfer questions should not have been submitted and the jury's answers to those questions were properly disregarded by the trial court. *Spencer,* 876 S.W.2d at 157. Points of error two and three are overruled.

***167 IV. CONSPIRACY**

[12] [13] [14] In point of error four, the Newsomes challenge the factual sufficiency of the evidence to support the jury's answer to question 6 relating to their conspiracy claim. Because the conspiracy claim is an issue where the Newsomes bore the burden of proof, the Newsomes properly raise a "great weight" challenge. In reviewing the Newsomes' "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great preponderance of the evidence supports its nonexistence. *See Cropper v. Caterpillar Tractor Co.,* 754 S.W.2d 646, 651 (Tex.1988); *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986) (per curiam); *Hickey v. Couchman,* 797 S.W.2d 103, 109 (Tex.App.--Corpus Christi 1990, writ denied). We may reverse and remand only if we conclude that the complained of finding or nonfinding is against the great weight and preponderance of the evidence. *See Cropper,* 754 S.W.2d at 651; *Cain,* 709 S.W.2d at 176.

In answer to question 6, the jury failed to find that the Bank engaged in a civil conspiracy with the judgment debtors to fraudulently transfer funds. The jury was instructed that "civil conspiracy means a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." The jury was further instructed that "to find civil conspiracy, each of the following elements must exist: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages that were proximately caused by the conspiracy, if any."

[15] It is uncontroverted that Dr. Johnson attempted to avoid paying the Newsome judgment by "laundering" income from his medical practice through bank accounts held in the name of family members, employees or business associates. Although Bank officials were aware of Dr. Johnson's predicament, the issue for the jury was whether the Bank knowingly participated in Dr. Johnson's scheme. The great weight and preponderance of the evidence suggests that while the Bank may have engaged in imprudent banking practices, there was no conspiracy.

Dr. Johnson denied that he or any of his family members, employees or business associates talked to Bank employees or officers about hiding assets from the Newsomes. Dr. Johnson's testimony is supported by almost every witness in the case. Bill Terry, who was the Bank's former senior vice-president and Dr. Johnson's loan officer, testified that he never discussed with Dr. Johnson, his family, or employees any action to avoid paying the Newsome judgment. Terry testified there was never a plan or agreement with Dr. Johnson, his family or his employees to avoid paying the Newsome judgment. Robert Kramer, the Bank's former cashier who handled the writ of garnishment, testified that he had no knowledge of a conspiracy between Dr. Johnson and employees of the Bank to defraud the Newsomes out of collecting their judgment. The Bank's former president, Thomas Sooy, testified he was not aware of any conspiracy by employees of the Bank to defraud the Newsomes. Sooy flatly denied any conspiracy involving himself, Bank employees and Dr. Johnson to destroy banking documents or otherwise aid Dr. Johnson in avoiding the Newsome judgment.

Further, the Bank's expert, William Watkins, concluded that there could not have been a conspiracy based on the facts of this case. According to Watkins, an expert in bank fraud and conspiracy, a conspirator would not, as the case here, use other accounts at the very same institution where he was conspiring to withhold funds, nor would a conspirator put accounts in the name of family members. Watkins also testified that the number of people alleged by the Newsomes to be part of the conspiracy was too large. If there was a conspiracy, Watkins testified the conspirators would have kept the transactions under $10,000 so the bank could have avoided having to complete Currency Transaction Reports. While there were transactions of $10,000 or more, Watkins admitted that he had not actually seen any Currency Transaction Reports.

***168** In any event, Watkins pointed out that one of the challenged cashiers checks drawn on the Bank was sent to Dr. Johnson's court-appointed receiver and that a conspirator would not use a bank that was paying money to a receiver. Watkins testified that the Bank complied with banking industry standards in response to the various court orders and never deviated from normal business practices. According to Watkins none

of the transactions he reviewed were unusual or suspicious and he did not see anything in the case that would lead him to believe that the Bank acted in bad faith. Lastly, Watkins testified that because Dr. Johnson was not a significant depositor and because funds were deposited and then withdrawn quickly, the Bank had no motive, financial or otherwise, to engage in a conspiracy with Dr. Johnson.

Even the Newsomes' banking expert, William Smith, conceded that he had no knowledge of an agreement between the Bank and the Johnsons to defraud the Newsomes. While Smith stated that many of the transactions at issue constituted questionable or imprudent banking practices, he refused to say that the Bank acted in bad faith. While we do not detail all the evidence in the record, we cannot say, based on the evidence cited above, that the jury's failure to find a conspiracy is against the great weight and preponderance of the evidence. *See Ellis County State Bank v. Keeve*, 888 S.W.2d 790, 794 (Tex.1994) (when affirming the trial court's judgment on sufficiency grounds, an appellate court is not required to set forth all of the evidence supporting the judgment). Point of error four is overruled.

V. THE BANK'S CROSS-POINT

By cross-point, the Bank contends the trial court's judgment should be modified as follows: (1) to reflect that the court granted the Bank's motion to disregard jury findings; and (2) to tax costs against the Newsomes, rather than the Bank. We agree.

A. The Bank's Motion To Disregard

[16] In its motion to disregard, the Bank asserted in part that the jury's answers to questions 2 and 5 regarding the amount of funds fraudulently transferred by the judgment debtors were immaterial. By refusing to award the Newsomes those amounts in its judgment, the trial court in effect disregarded those answers. However, the trial court's judgment erroneously recites that it denied the Bank's motion to disregard. Thus, the judgment should be modified to reflect that the trial court granted the Bank's motion in part.

B. Costs

[17] [18] Texas Rule of Civil Procedure 131 provides in pertinent part: "th successful party to a suit shall recover of his adversa *al.* costs incurred therein...." TEX.R. CIV. P. 131 (Vernon 1979) (emphasis added). Rule 141 states: "the court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." TEX.R. CIV. P. 141 (Vernon 1979). Thus, Rule 131 requires that the successful party to a suit recover costs from the adverse party, unless the trial court finds good cause to adjudge the costs otherwise and states its reasons on the record pursuant to Rule 14. *Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.* 928 S.W.2d 100, 112 (Tex.App.--Houston [14th Dist.] 1996, writ requested) (citi *Contemporary Health Management, Inc. v. Palacios* 832 S.W.2d 743, 745 (Tex.App.--Houston [14th Dist.] 1992, no writ)). The proper standard for reviewing a trial court's good cause is to determine whether the trial court clearly abused its discretion. *How* 928 S.W.2d at 112 (citing *Contemporary Health*, 832 S.W.2d at 746).

[19] [20] Here, the jury's verdict and the court's judgment vindicated the Bank's right to make the transactions which the Newsomes contended violated statutory duties or duties in tort. Thus, the Bank was the successful party. (Fl *S. Perez v. Baker Packers*, 694 S.W.2d 138, 143 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (a "successful ***169.** party" is one who obtains a judgment of a competent court vindicating a civil claim of right). However, the trial court did not state the reasons for assessing costs contrary to the rule. In the absence of any explanation for its actions, the trial court abused its discretion in assessing costs against the B *See Howell*, 928 S.W.2d at 112. Thus, the trial court's judgment should be modified to award all costs to the Bank. Accordingly, the Bank's cross-point is sustained. Having overruled the Newsomes' points of error, we need not reach the Bank's conditional cross-points.

The trial court's judgment is hereby modified to award all court costs to the Bank and to accurately reflect the trial court's ruling granting in part the Bank's motion to disregard jury findings. The remainder of the trial court's judgment is affirmed.

FN1. Although the judgment debtors were named as parties to this suit, the Newsomes did not seek a new judgment against the judgment debtors and thus, they are not parties to this appeal.

FN2. The Newsomes amended their petition no less than seven times. Each time they asserted a new cause of action or identified additional parties, who they alleged held accounts for the benefit of the judgment debtors at the Bank or to whom they alleged the Bank improperly transferred funds. The Bank filed corresponding answers, asserting several

affirmative defenses and never waivering in its position that it fully complied with the writ of garnishment served upon it.

FN3. Contrary to the Newsomes' contention, *Bank One* does not create any kind of exception for funds held in the name of a judgment debtor's spouse. Where the character or ownership of such funds is in question, the supreme court has clearly stated that a garnishee need not impound funds before the court determines ownership *Bank On* 824 S.W.2d at 558. To require otherwise, even where funds might belong to the community, would impermissibly shift the responsibility of determining ownership from the court to the garnishee. *See id.*

FN4. This language was added to the rule by order of the supreme court, effective January 1, 1978. Article 4084, now section 63.003 of the Civil Practices and Remedies Code, contains identical language. Article 4084 was in effect wh *Jareck* was decided and when the writ in this case was served.

FN5. Presumably, the trial court disregarded the answers to questions 3 and 5 because the jury found in question 4 that the Bank accepted the post-September 1, 1987, funds in good faith and for a reasonably equivalent valu *Se* TEX. BUS. & COM.CODE ANN. § 24.009(a).

FN6. To prove that the Bank knew that Dr. Johnson was the source of funds in the third-party accounts in question, the Newsomes offered into evidence a financial statement, which was prepared by the Bank on Dr. Johnson in 1987. The financial statement shows numerous loans from the Bank to Dr. Johnson and related third-parties during the course of this litigation. While the financial statement also shows partial repayment of these loans, the Newsomes never tried to establish what loan proceeds, if any, were fraudulently paid to the Bank so as to confer transferee status on the Bank under the holding in *Coutee.*

FN7. The Newsomes' tort and statutory claims were the subject of this litigation. Thus, the fact the Newsomes recovered under the writ of garnishment does not alter the Bank's status as a successful party under Rule 131.

cite as:

Newsome v Charter Bank Colonial, 940 S.W. 2d 157 (1996).

Court: Tex.App. Houston 14th Di
Judges: Murphy, Majority

Underpinnings: Click here to view authorities cited by 940,SW2d,157

citations:

Published for April 1998 - June 1998

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	<Texarkana App.>	
	1998 Tex. App. LEXIS 1625	Phippen v Deere & Co.
	98:12 Op. Serv. Ct. App.(Civ.) 183	

Published prior to April 1998
writ denied

Cascade - Notes

TC w/ Asst DAJ Ron Bailey - head mgk BIR

Bellinger's dlp of C dispunct & Owner in Malaysia -

April 17th - PTH.

[redacted]

Linda Brooke

↳ [redacted]

fax [redacted]

A G Crouch We'll sue BASF
Knows BASF
trips to Bahamas for BASF
wife & dumb guy
clerk to accountant
- several who knew

trading

dumping wash water
charges to BASF for
wash water & rinsing [?] [illegible]

Grand Jury testimony -

5 off
1 on
Rig 7 offshore

& Rig 7 is actually [illegible] services & Rig 7 was making money

Rosch

Andrew Campbell

[redacted]

Steven King

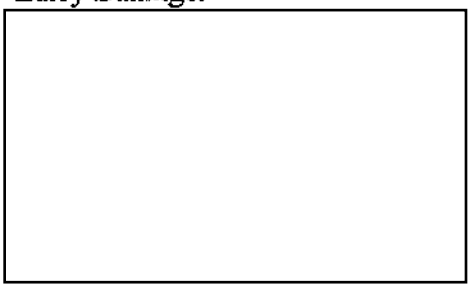
[redacted]

Linda Broche

[redacted]

Becky Ohler
TNRCC Air Program Inspector

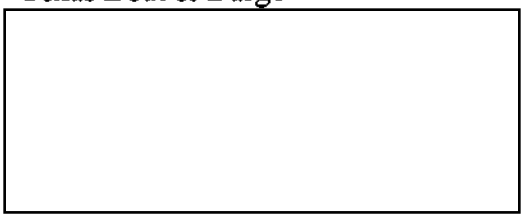
Larry Ballinger



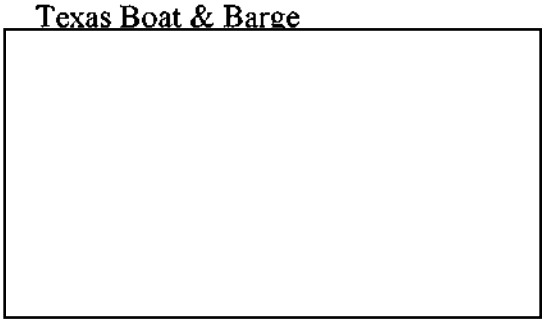
Tom Seward, President
Hercules Marine & Offshore

Tom Horde
Vice President
Hercules Marine Services

Mickey W. Tiner
President
Texas Boat & Barge



Juan Francisco Gonzales
Cleaning Superintendent
Texas Boat & Barge



BASF Employees:

Robert Peters
BASF Logistics Coordinator
602 Copper Road
Freeport, Texas 77541
Received call from Ballinger that barges were cleaned illegally; 98% BASF barge traffic is Cyclohexane use.

Edwin Bergmann
BASF Senior Environmental Engineer - MSDS Sheets

Chris Nielson (girl) Freeport Procurement Service Director

L.H. "Bubba" Moore
BASF logistics Manager
BASF Ballinger friend - Mark Hanna Customer Technical Services Rep.

BASF Environmental Manager
Bobby Atkins - said waste water was Hercules problem, not BASF.

Robert P. Engram
BASF Purchasing Agent -- Blanket P.O. File F91392
Res: 948 Mulberry
Brazoria, Texas

(1) BASF monthly schedule of Cyclohexane shipments picked up by BASF in barges.

(2) BASF work requests faxed or otherwise delivered to Hercules describing barge to be cleaned.

(3) MSDS Cyclohexane

(4) Peters day timer/planner notes re: Ballinger contact

(5) Barge cleaning procedures

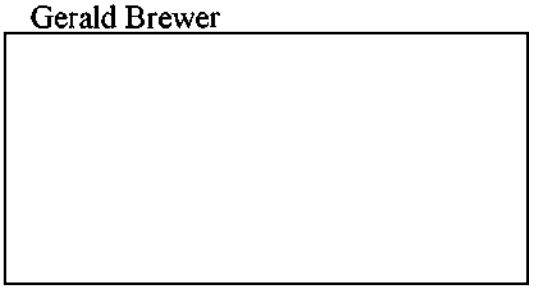
Gerald "J" Brewer, Intertek Testing Services (ITS) Caleb Brett
Operations Mgr.
ITS Caleb Brett
214 N. Gulf Blvd.
Freeport, Texas 77541

Charlie Bennett, ITS Caleb Brett Inspector
Other Inspectors: Nathan Dempsey
Gary Carter
J. Brewer

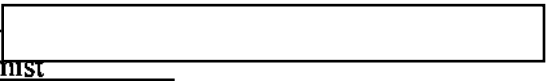
20 barge inspections done

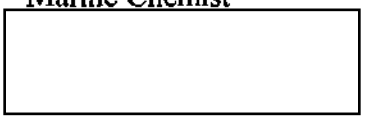
Charlie Bennett

Gerald Brewer

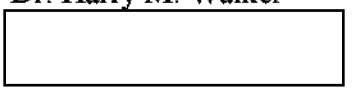


Eric Moore -
Marine Chemist





Dr. Harry M. Walker



Asked to submit permit in '94; told them how - they blew it off.

Claudio Gomez Duarte, Jr.

Juan Luis Rivera "Johnny" - "John"

Jessie Cormacho - Former Manager

Becky Ohler
TNRCC Air Program Inspector

Larry Ballinger

Still Consults for Hercules

Tom Seward
President
Hercules Marine & Offshore

Tom Hosle
V.P.
Hercules Marine Services

Mickey W. Tiner
Pres
Texas Boat & Barge

Juan Francisco Gonzales
Cleaning Superintendent
Texas Boat & Barge

BASF ees

Robert Peters
BASF Logistics Coordinator

→ received call from Ballenger that barges were cleaned illegally

90% to BASF barge traffic is in cyclohexane use.

[redacted]

Edwin Bergmann
BASF Senior Environmental Engineer — MSDS sheets

Chris Nielson Freight Procurement Service Director

BASF Ballenger freq

L.H. "Bubba" Moore
BASF Logistics Manager

Mark Hanna
Customer Technical Service Rep.

BASF environmental Manager
Bobby Atkins – used waste water acc there problem not BASF

Robert P. Engram
BASF Purchasing Agent

} Blanket P.O. file F91392

[redacted]

(1) BASF monthly schedule of cyclohexane shipments picked up by BASF in barge

(2) BASF work requests faxed or otherwise delivered to Hercules describing barge to be cleaned.

(3) MSDS cyclohexane

(4) Peters day timer/planner notes re Ballenger con

Gerald "G" Brewer, Internet Testing Servs (ITS) Caleb Bret

Operations Mgr.
ITS Caleb Brett

[redacted]

Charlie Bennett, ITS Caleb Brett Inspector

Other inspectors: Nathan Dempsey
Gary Carter
J. Brewer

20 barge inspections done

Charlie Bennett

[redacted]

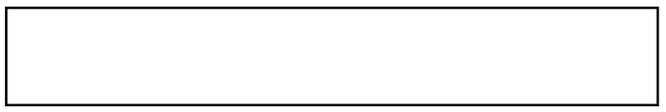
[redacted]

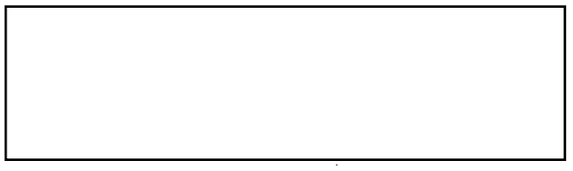
Gerald Brewer

[redacted]

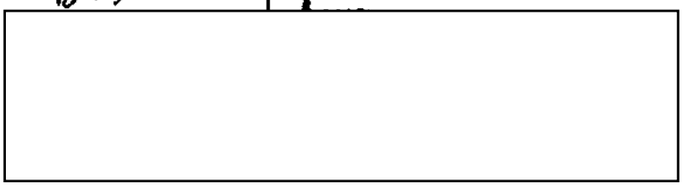
[redacted]

Eric Moore –
Marine Chemist



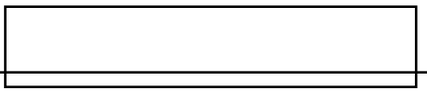


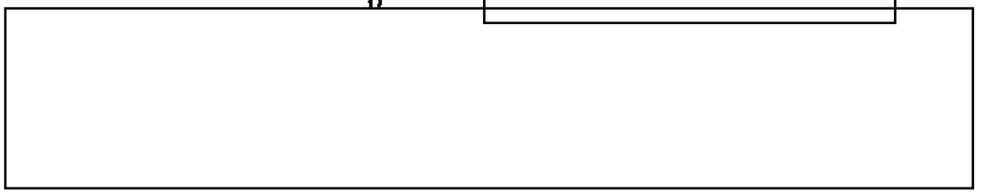
Dr. Harry M. Walker



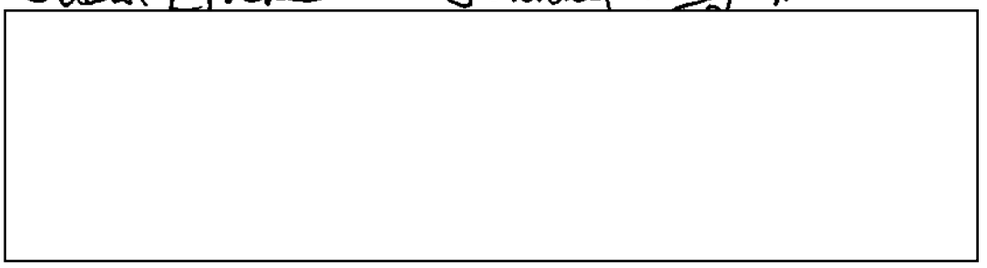
called to submit permit in '94
told them how –
they knew it by

Gomer
Claudio Duarte Jr.





Luis
Juan Rivera "Johnny" – assisted



Jessie Comacho
? former mgr.

Not in compliance

BASF -

cleaning W10 ~~[illegible]~~

TIC

Micky Trent

1/2 or more TNRCC

may have over 1/2 1L of pressure
if don't fix will continue out of compliance

Prodise Dayal (713) 767-3737